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IN THE

Supreme Court of the United States

October Term, 1969

No. 386

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

THOMAS CADILLAC, INC., and LOU EHLERS CADILLAC,

Intervenors.

PETITION FOR WRIT OF CERTIORARI.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

THOMAS CADILLAC, INC., and LOU EHLERS CADILLAC,

Intervenors.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, International Association of Machinists District Lodge 94, AFL-CIO, hereinafter called "Machinists" and Automotive Marine, Production Finishers, Equipment, Maintenance and Public Service Painters Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, hereinafter called "Painters" pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered into the above entitled case on May 2, 1969. Such

judgment affirmed an Order of the National Labor Relations Board which, overruling that of the Trial Examiner, concluded that Respondents by refusing to recognize Petitioner Machinists and Painters with respect to terms and conditions of employment of the employees formerly on the payroll of General Motors Corporation, or with respect to employees hired by Respondent after purchasing the separate dealer franchises, did not violate Section 8(a)(5) of the Act. Consequently, the Board ordered the complaint dismissed in its entirety.

Opinion Below.

The Opinion of the Court of the Appeals below is not yet reported and is attached hereto as Appendix "A." The Decision and Order of the National Labor Relations Board is reported at 170 NLRB No. 92 and is attached hereto as Appendix "B." The intermediate report and recommended Order of the Trial Examiner is attached hereto as Appendix "C." The printed transcript in the Court below is referred to herein as "JA."

Jurisdiction.

The Judgment of the Court of Appeals was entered on or about May 2, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented.

Whether Section 8(a)(5) imposes the duty upon the purchaser of a business to negotiate with the certified bargaining agent as to the retention of all or some of the seller's employees on the payroll?

Statute Involved.

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 21 U.S.C. 151 *et seq.*), are Sec. 8(a)(5) and 9(a), as follows:

Sec. 7: "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Sec. 8(a)(5): It shall be an unfair labor pracitce for an imployer . . . to refuse to bargain collectively with the representatives of his employer, subject to the provisions of section 9(a).

Sec. 9(a): Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

Statement.

A. The Board's Findings of Facts:

General Motor's operated a Cadillac motor cars sales and service business in Los Angeles from 1946 to May 28, 1965. Its locations were at 5151 Wilshire Boulevard, herein called "Wilshire" and additionally, since January 1954, a location at Seventh and Bixel herein called "Bixel" [JA Vol. I, p. 13].

On August 1, 1957, the Petitioner Machinists was certified by the Board as the collective bargaining representative of certain of Cadillac's service employees at Wilshire and Bixel [JA Vol. III, pp. 1103, 1104]. On November 6, 1958, Petitioner "Painters" was certified by the Board as the Collective Bargaining Representative of Cadillac's painters at Wilshire and Bixel [JA Vol. 3, pp. 1107, 1109]. Successive agreements were negotiated between the parties, the last being entered into on December 1, 1964 [JA Vol. II, p. 527, GC-6A]. By its terms the agreement cantinued in full force and effect without change until December 1, 1967.

On January 12, 1965, General Motors advised the Machinists and Painters Unions by letter that it was in the process of reconsidering its policy of operating its own Cadillac agencies and that it was contemplating the transfer of Bixel and Wilshire to independent dealers. On May 10, 1965, General Motors advised the Unions by letter that Thomas Cadillac, Inc. and Lou Ehlers, Cadillac, Inc. would take over the Bixel and Wilshire branches respectively on June 1, 1965 [JA Vol. III, p. 1081]. Thereafter, the Unions, by their attorneys, addressed letters to Thomas and Ehlers.

(1) Correspondence With Ehlers.

By letter dated May 19, 1965, the Unions requested Ehlers to meet with their representative, stating *inter alia:*

"The employees at the Wilshire Branch and the above unions are concerned that this change will not adversely affect them.

> "In order to clarify the rights of the employees and above unions and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience." [JA Vol. II, p. 642].

By letter dated June 3, 1965, the Union attorney wrote to Respondent Ehlers' legal counsel and stated *inter alia:*

> "You have previously advised that the employer does not consider himself bound by the terms of the existing bargaining agreement between the Machinists and Painters Union and Cadillac Motor Car Division of General Motors Corp. . . . At this time the Union requests that your client arbitrate the question as to whether the existing contract is binding upon him." [JA Vol. II, p. 644].

On June 7, 1965, counsel for Respondent Ehlers wrote to the Unions' legal counsel and in reply stated:

> "Please be advised, in reply to your letter of June 3, 1965, that Lou Ehlers declines your request for arbitration." [JA Vol. II, p. 45, GC, 7-(c)].

On June 8, 1965, the Painters Union, through its legal counsel, made a similar request for arbitration [JA Vol. II, pp. 647-648, GC 7 (e)], and on June 14, 1965, Ehlers' counsel similarly declined arbitration [JA Vol. II, p. 648, GC 7 (f)]. Respondent Ehlers at no time recognized or bargained with the Unions [JA Vol. I, p. 18].

(2) Correspondence With Thomas.

On May 17, 1965, the Painters Union, through its counsel, communicated with Thomas stating *inter alia:*

> "We have been advised by Cadillac that your company will be assuming the operations at the West Seventh Street branch on June 1, 1965.
>
> "The employees at the West Seventh Street Branch and the above unions are concerned that this change of ownership will not adversely affect them.
>
> "In view of the history of a high level of dealings and a friendly relationship with your business concern, it is assumed by the above unions that your company will recognize and bargain with the above unions.
>
> "In order to clarify the rights of the employees and the above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience. This meeting should include a representative of your company, the Painters Union and myself, the Machinists Union and its attorney, Herb Ansell." [JA Vol. II, pp. 720-721].

On May 18, 1965, the Painters Union through its legal counsel, communicated with Respondent Thomas and stated that it had learned Thomas was requesting the General Motors employees at Bixel to sign applications for employment with him. The letter again suggested the need for a meeting with Union representatives [JA Vol. II, p. 722].

On June 8, 1965, the Machinists Union again requested that Respondent Thomas arbitrate the question

of the contract's applicability and on June 9, 1965, the Painters Union did likewise [JA Vol. II, pp. 723-725].

Respondent Thomas failed to respond to any of the requests.

(3) The Employee Staff Prior to and Following the Transfer of Ownership.

Shortly prior to May 28, 1965, General Motors both at Wilshire and at Bixel had a staff of new and used car salesmen, service employees, and office and supervisory employees [JA Vol. II, pp. 714-719, GC-9, 10, 11]. In addition, General Motors owned certain personalty both tangible and intangible, at both Wilshire and Bixel, used in connection with its operations [JA Vol. II, pp. 519, 541, 727, 751, 792, GC-3(a), 14(a) and 14(b)].

As of May 28, 1965, General Motors operated complete facilities for the sale and service of new and used Cadillac motor cars at both Wilshire and Bixel [JA Vol. I, pp. 203, 273].

Just prior to May 28, 1965, General Motors, at Wilshire employed 39 service employees represented by the Machinists, and three employees represented by the Painters Union [JA Vol. I, p. 153, GC-10; JA Vol. II, p. 715]. Of the former, all but one were members of the Machinists and in the Painters category all were members [JA Vol. I, pp. 154-155].

In May, 1965, General Motors at Bixel employed 69 service employees represented by the Machinists and six service employees represented by the Painters Union [JA Vol. I, p. 155; JA Vol. II, p. 714, GC 11]. In the Machinists classification, all were members of the Union except two while in the Painters classification, all were members except one [JA Vol. I, pp. 154-155].

(4) The Sale to Ehlers and Thomas and the Commencement of Operations.

Commencing in March, 1965, both Thomas and Ehlers began negotiating with General Motors relative to procuring a franchise for the West Seventh Street and Wilshire Branches respectively, and purchasing certain designated assets of General Motors at said locations. During those negotiations, both Ehlers and Thomas were advised that a Labor Agreement was in existence between General Motors and Petitioner [JA Vol. I, pp. 164, 339]. On May 11 and 12, 1965, General Motors and Thomas and Ehlers respectively executed Buy and Sell Agreements and the Franchise Agreement, the details of which are set forth in the Trial Examiner's Opinion [JA Vol. I, pp. 20-23]. Essentially, the control retained by General Motors as to the means by which their automobiles would be distributed through the dealerships was so great as to afford it the power to prescribe the precise manner by which those dealerships would be operated and to terminate the franchise agreements with very little restriction at any time it desired. The Trial Examiner found the effect of the transfers in this regard to be as follows:

> "The employing industry as it existed before the acquisitions of the Respondent employers consisted of the operation of the enterprises for the sale of Cadillac motor vehicles, parts and accessories, and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California. After the successions these enterprises were continued at the same locations without substantial change, with the performance of substantially the same work by former

> General Motors employees. Any deviations from the precise practices or procedures of General Motors effected by the Respondent employers when they assumed operations were not of such a nature as to destroy the continuity and identity of the employing enterprise or alter the basic similarity of the Respondent employers' operations from those of General Motors. Moreover, by the Direct Dealers Selling Agreement, General Motors assured a continuation of operations of the two branches along lines compatible with General Motors directions and prior policies. The employing enterprise remained as before the acquisitions, i. e., the Sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles. The employing structure remained the same." [App. C, pp. 40-41].

Notwithstanding the attempts made by Petitioners to negotiate with the Companies concerning the effects of the sale upon their members, the Respondents proceeded unilaterally to hire its new work force by resort to newspaper advertising and other means.

All of the service employees employed by General Motors in the contract unit at the Seventh Street branch were interviewed for employment by Thomas' service manager, Lloyd Coats, and each upon request submitted applications for employment. Out of sixty-three employees hired for the service department, sixteen were former General Motors employees; one had been in the Painters unit and the others in the Machinists. Two General Motors employees were disqualified from employment because they had reached the age of sixty-

four. According to La Rue Thomas, employees were hired on the basis of their ability.

Out of a service supervisor's staff of seven, on June 7, 1965, three had been service supervisors previously at that location for General Motors. A used car salesman for General Motors became an assistant used car manager for Respondent Thomas and the General Motors supervisor of accounting became Respondent Thomas' business manager. Of the twenty-five new and used car salesmen employed on June 1, 1965, by Thomas, fifteen to seventeen were employed previously in that capacity by General Motors [JA Vol. III, p. 878].

Since June 1, 1965, Respondent Thomas has operated the Bixel branch and has been engaged in substantially the same business operation as formerly engaged in at such branch by General Motors.

Lloyd Coats, Service Manager for Respondent Thomas, testified in his deposition, as follows: that he did all the hiring for Thomas, that he interviewed approximately 100 employees, including all of the former General Motors employees; that the standards he applied were loyalty, honesty, and a good mechanical background; that none of the former General Motors employees failed to meet these standards; that with the exception of three employees who he disqualified because of age, he couldn't recall any other specific factor that disqualified any of the General Motors employees for hire [JA Vol. III, pp. 819-820].

At the Wilshire branch, all of the service employees working for General Motors made application for jobs and were reviewed for hire by Irving Graham, who became service manager under Ehlers (JA Vol. I, p. 24].

The stated object was to select the most competent and satisfactory persons. Of the thirty-five service employees employed by Ehlers in June, Irving Graham hired eleven former General Motors employees. Graham, in his deposition, testified as follows: that the General Motors mechanics on the payroll as of May 28, 1965, had all received training at General Motors School; that he received prior to May 28, 1965, some complaints from customers about the quality of service work performed but after investigation, he determined that a large number of those lacked any merit; that it is extremely common to receive some number of complaints in the automotive field; that the percentage of complaints which he determined to have merit after investigation was less than he encountered at the Seventh Street location; that the eleven General Motors employees he invited to work at Ehlers were in general more "versatile" and had "more background experience with Cadillacs" than the others, and were "more competent." [JA Vol. II, pp. 410-413]. Ehlers, as of June 1, 1965, had fourteen persons employed in supervisory capacity throughout the service and maintenance departments. Of this number, nine were employed by General Motors prior to June 1, 1965. [JA Vol. II, pp. 447-455, GC-3]. Of the five personnel employed in the parts department under Ehlers, all of them were employed previously by General Motors in the same location and the same department [JA Vol. II, pp. 458-460]. Of the twelve persons employed by Ehlers in the clerical section, eight were previously employed in that section by General Motors at the same location and one additional was employed at the Seventh Street factory branch [JA Vol. II, pp. 460-465]. Of the twelve new car salesmen and four used car salesmen em-

ployed by Ehlers as of June 1, 1965, all of them were on the payroll for General Motors at the Wilshire branch prior to the takeover [JA Vol. II, p. 466]. In total, Ehlers hired a total of eighty-seven employees, including management and supervision, of whom fifty-four had formerly been employed by General Motors at the Wilshire Boulevard branch. Some General Motors Work-in-Process was completed by Ehlers [JA Vol. I, p. 24].

Neither Thomas nor Ehlers ever petitioned the Board for the conduct of an election in order to resolve the question of representation. Neither did they ever indicate a doubt that Petitioners represented the great majority of the employees on the payroll of General Motors, as of May 19, 1965. The Trial Examiner found that May 11 and 12, 1965, the date of execution of the appropriate documents, was the date of succession [JA Vol. I, p. 43]. This finding was not reversed.

Thus, out of sixty-three employees in the service department, Thomas hired sixteen. Out of thirty-five service employees formerly at Wilshire, Ehlers hired eleven.

Proceedings Below.

A consolidated complaint issued November 30, 1965, and the matter was heard before Trial Examiner Lowell Goerlich on February 23, 24, 25 and 28, 1966. The Complaint alleges that

> "since on or about May 19, 1965, and thereafter the IAM has requested . . . that Respondent Ehlers bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of the employees . . ."

A similar allegation was made with respect to Respondent Thomas [JA Vol. I, pp. 349-350]. It is then alleged that the respondents have refused to bargain collectively with respect to rates of pay, . . . and other terms and conditions of employment. . . . [JA Vol. I, p. 352]. Similar allegations are contained with respect to Petitioner Painters [JA Vol. I, pp. 352-353]. The Trial Examiner concluded that there was sufficient similarity in the employment industry at both Wilshire and Bixel before and after the transfer so as to constitute Thomas and Ehlers successors to General Motors Corp. He concluded, therefore, that by refusing to hire the employees at General Motors, or to bargain with Petitioners on this question, and by refusing to recognize said Petitioners in any regard as bargaining agent, Section 8(a)(1) and (5) had been violated. By way of remedy, the Trial Examiner ordered: (1) that the employees formerly on the payroll of General Motors in the bargaining unit be reinstated and made financially whole (2) that Thomas and Ehlers recognize and bargain with petitioners; (3) that Thomas and Ehlers honor and give effect to the existing collective bargaining agreement between the unions and General Motors dated December 1, 1964; (4) that Thomas and Ehlers cease changing unilaterally the working conditions of the employees; and (5) that Thomas and Ehlers cease interfering with, restraining or coercing the employees in the exercise of the rights guaranteed by Section 7 of the Act.

On March 29, 1968, the Respondent National Labor Relations Board, hereinafter called "Board," issued its Order finding that the Trial Examiner's rulings were affirmed but essentially reversing his determination that

successorship existed. The Board concluded that Respondents Thomas and Ehlers did not owe a duty to bargain with either of Petitioners and consequently the complaint was dismissed. *We note that all evidence relating to the request for recognition, the refusal by Ehlers and Thomas to discuss the issue of employee retention, and the subsequent hiring of personnel by standards known only to Thomas and Ehlers was placed before the Trial Examiner.*

The Court of Appeals, in affirming the Board, stated that the operational format and a nondiscriminatory personnel turnover negated a finding of successorship. The opinion stressed the difference in business objective between the independent dealerships on the one hand and the General Motors factory affiliated service establishment on the other.

The concurring opinion dealt considerably with the question of the relationship of the employees of the old enterprise to the owner of the new. It stressed that this relationship was entitled to protection "during the hiatus between the time of sale and actual takeover." The opinion then states that the employees of the Seller are not to be equated with strange applicants, and that a duty exists upon the Purchaser to recognize the bargaining agent on the issue of retention of jobs. Conceding this duty was not fulfilled by Ehlers and Thomas, the concurring opinion then states that because of the General Counsel's failure in his complaint to charge a failure to bargain over the limited issue of continuation of employment for the General Motor's employees, rather than the duty to bargain with the Unions as bargaining agent for all conditions of employment, the issue was not properly before the Court.

REASONS FOR GRANTING THE WRIT.

Employees of a Unionized Business Concern Which, After Sale, Maintains a Continuity of Business Purpose, Are Afforded the Right Under Federal Law to Have the Continuation of Their Employment Determined by the Collective Bargaining Process.

Decisions of this Court and the Circuits have made clear that the interest of a working man in retention of employment is entitled to the highest priority and that the duty to bargain requires a sincere effort through collective bargaining to protect this interest.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 214.

In *Cooper Thermometer Co. v. NLRB*, 376 F. 2d 684 (CA-2), the Court stated at page 688:

> *"The most important interest of workers is in working;* the Board may reasonably consider that the employer does not fulfill his obligations under Section 8(a)(5) if he refuses even to discuss with the employee representatives on what basis they may continue to be employed." (Emphasis added.)

This issue, in the context of an economic strike, likewise has engendered great concern by this Court. In *NLRB v. Erie Register Corp.*, 373 U.S. 288, 229, 333, employers were held to be required, subject to limited exception, to reinstate economic strikers upon the termination of the strike, and their failure to do so was held to necessarily infringe upon the employees free exercise of "concerted activities for the purpose of collective bargaining."

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, this Court recognizing the high priority afforded to the right to work stated that:

> "A refusal to reinstate striking employees . . . is clearly no less destructive of important employee rights than a refusal to make vacation payments." (p. 379).

And again:

> "*This basis right to jobs* cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application, and 'the right can be defeated only if the employer can show legitimate and substantial justifications.'" (Emphasis added.) (p. 379).

In *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (CA-3), an employer prior to moving his business location was held required under Section 8(a)(5) to notify the Union of his intentions so that the Union would have opportunity "to bargain over the rights of the employees whose employment status will be altered by the managerial decision." (p. 196).

The priority afforded to work opportunities is well recognized by the Board in *Westinghouse Electric Corp.*, 150 NLRB 1574. In that case, the Board, in rationalizing the *Fibreboard* line of cases, states:

> ". . . where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has invariably appeared that the contracting out . . . affected a change in conditions of employment, or resulted in a signif-

icant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit." (p. 1576).

The right to work we submit is one of the "important employee rights" within the protection of Section 7, whether the employee is engaged in an economic strike or whether he simply works for an employee who fortuitously sells the business concern to another. In either case, the refusal to reinstate the striker and the refusal to even discuss with the certified bargaining agent the conditions under which all or some of the seller's work force might be retained are equally "destructive" of such rights.

As the Trial Examiner stated in the instant case:

> "Moreover . . . through the happenstance of succession, employees are exposed to the loss of seniority, accrued employment benefits and job security. Furthermore, employees who have reached an age when their employment is not attractive to employers but whose qualifications for employment otherwise would be suitable, may be cast upon a labor market to flounder about with a strong probability that they will continue unemployed and the dregs of the labor market. Such unhappy results do violence to the humanitarian objectives of the Act and the teachings of the Court to the end that employees may be protected 'from a sudden change in the employment relationship.' Surely such a strained construction of the Act ought not to be indulged unless clearly compelled by the Act. . . ." [App. C, pp. 48-49].

It is recalled that the certified bargaining agents attempted to meet with the employer prior to the actual physical change-over of ownership. Their offer was flatly refused by Ehlers and ignored by Thomas. Subsequently, on May 19, 1965, the employees were terminated by the seller. The majority opinion in the decision below stresses that Thomas and Ehlers selected its new employees "on the basis of skill, ability and experience and were in no way influenced by Union membership of the job applicant." [App. A, p. 4].

We submit this is the vice of the problem. Rather than submitting the important question of retention of employment of the many long time employees to the collective bargaining process, the companies unilaterally looked to the outside and applied its own mystic criteria. The lower Court lauds Ehlers and Thomas for the fact that they did not discriminate. *It is immaterial, we submit, as to what standard the employers applied. They were bound by Federal law to bargain collectively with the Unions at least during the hiatus period with respect to the retention of the work force. The preservation of job opportunities by the union for as large a number of employees as possible was a matter of legitimate interest to the Union and the many long time employees affected.*

Ehlers and Thomas treated the employees of General Motors as new job applicants. We submit the law in its wisdom has gone beyond this point. It recognizes uniformly that employees of a seller have sufficient contact with the new employer so as to be protected by the Act. In *K. B. & J. Young Supermarkets v. NLRB*, 377 F. 2d 463 (CA-9) the Court treated the termination by the predecessor as the termination of the suc-

cessor and held in effect that the successor owed a duty to bargain with respect to retention of employment.

In *Chemrock Corp.*, 151 NLRB 1074, 1078, a decision relied upon heavily by the Trial Examiner but totally ignored by Respondent Board and the majority opinion in the lower Court, the Board held that in this area the purchaser is obligated to bargain with the incumbent Union before it terminates or otherwise changes the employment status of the predecessor's employees. If the purchaser fails to fulfill this obligation to bargain, it will be presumed that had he done so, he would have hired the predecessor's employees and the criterion of substantial continuity of employee compliment will have been satisfied.

The concurring opinion of Justice Leventhal in the decision below recognizes the employer's duty in this area. The opinion states:

> "Employees of the old enterprise may, for some limited purpose, stand in a relationship to the owners of the new enterprise that has some protection during the hiatus between the time of sale and the actual takeover. They are not necessarily to be equated with strange applicants for employment in the new enterprise. . . . In some cases that can be denominated full successorship there may be a complete transfer of the duty to bargain with representatives already chosen by the employees. . . . The continuance of such a duty would depend on a finding of full successorship. This would require some retention of employees and a continuity of business purpose between the old and new enterprise. . . . Where there is a continuity of business purposes, there may be a preliminary

> and partial bargaining relationship during the transition period even though, for all the parties can know, there will ultimately be such a change made in good faith, that there will not be full successorship and that the previous choice of representative by the employees will no longer be valid. . . . The subject of such preliminary bargaining may include matters such as preferences for certain employees should the purchasing enterprise choose to retain workers with the skills possessed by the seller's employees. *This is a matter of particular concern to the employees and the Union.* . . ." [App. A, pp. 10-12]. (Emphasis added)

Obviously, Thomas and Ehlers owed a duty to meet with the certified bargaining agent pursuant to its request prior to the actual takeover, and termination of employees.

The concurring opinion dismisses this point then for the reason that the General Counsel's complaint

> "did not charge a failure to bargain over the limited issue of continuation of employment to the General Motors employees. Rather it charged broadside that the new employees failed to recognize and bargain with the Unions as representatives of a newly constituted employee units of the new enterprises. . . ." [App. A, p. 13].

Here we must respectfully disagree with the reasoning of the concurring opinion. The Complaint [JA-339] alleges that since May 19, 1965, the Machinist Union requested Ehlers to bargain collectively "with respect to . . . other terms *and conditions of employment* . . .", and since May 17, 1965, as to Thomas. Likewise, is the

case with respect to the Painters Union [JA 349-350]. At the hearing, this issue was fully litigated before the Trial Examiner [JA Vol. II, p. 642, GC 7(a), p. 644, GC 7(b), p. 45, GC 7(c), pp. 647-648, GC 7(e) p. 648, GC 7(f), pp. 720-721, GC 12(A), p. 722, GC 12(B), GC 12(C) and GC 12(D)]. Well established case law makes clear that so long as a matter is litigated at the hearing and a party is not surprised, the fact that a Board order is at variance with a complaint is not a ground for declaring it invalid. *NLRB v. Fant Milling Co.*, 360 U.S. 301 ("The Board was created not to adjudicate private controversies but to advance public interest in eliminating obstructions to interstate commerce. *National Licorice Co. v. NLRB*, 309 U.S. 350; *NLRB v. Kiekhaefer*, 292 F. 2d 130 (CA 7).

The Decision below recites that "even a cursory comparison of the differences in the enterprise as operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity." It then proceeds to stress the fact that Thomas and Ehlers were in direct competition for sales and service while under General Motors ownership, supposedly there was not aggressive advertising in sales promotion vis-a-vis other General Motors dealers; that management, accounting and advertising while formerly under control were totally separate and independent after the new franchise dealers took over. The Board and lower Court in effect stressed the form of the business enterprise. However, the Board itself has stated recently in *Texas Eastman Company*, 175 NLRB No. 105 (April 28, 1969):

> ". . . It is not the form of the transfer which controls but, as stated above, whether the employing industry remained essentially the same."

In the instant case the primary purpose of the enterprises prior to and following the transfer were the sale and service of new and used Cadillac automobiles. Admittedly, the functional activities of the employees in the bargaining unit were substantially the same. It was clearly developed that General Motors, while executing franchise agreements, by the terms thereof, strictly controlled the method and manner of selling and servicing its automobiles. Rather than distribute its own product, it chose to accomplish the same through the conduit of dealers. However, the franchise agreement makes clear the strict control that General Motors retained over its product. We do not argue this issue at greath length since it is recognized that the Board has made findings on this subject. *However, there is at least the "continuity of business purpose" sufficient to establish a "preliminary and partial bargaining relationship during the transition period . . ." in accordance with the concurring opinion below to impose upon the employer the limited duty of responding affirmatively to the Union's request to subject the important issues of retention of employment to the collective bargaining process.* It is unnecessary to determine the extent of the duty imposed upon the employers. The fact is that in the instant case, they chose to reject all efforts by the Unions to bargain in an effort to preserve some of the jobs of the long time employees, to unilaterally hire their employees from the outside by their own established criteria, and to ignore completely the fact that Petitioners had been the certified bargaining agents for over eight years.

The decision of Ehlers and Thomas with regard to selection of a work force was, as stated in *Fibreboard*:

"Suitable for resolution within the collective bargaining framework . . ." (379 U.S. at 214). See also *Order of Railroad Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330.

Conclusion.

From the above, it is clear that not only is an important question of Federal law presented in this petition for review, but that the Court below has decided a Federal question of substance erroneously and in conflict with applicable decisions of this Court and of the Second, Third and Ninth Circuits.

In effect, the lower Court has recognized that the legally protected interest of an economic striker in retaining his job is non-existent in the case of a working man who after years with a company is terminated when the purchaser elects to hire his new work force from outside sources.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

HERBERT M. ANSELL,
ABE LEVY,
PLATO E. PAPPS,
Attorneys for Petitioners.

APPENDIX "A".

On Petition to Review an Order of the National Labor Relations Board.

United States Court of Appeals for the District of Columbia Circuit.

No. 21,972

International Association of Machinists, District Lodge 94, AFL-CIO, et al., Petitioners v. National Labor Relations Board, Respondent, Lou Ehlers Cadillac & Thomas Cadillac, Inc., Intervenors.

Decided May 2, 1969

Mr. Herbert M. Ansell, of the bar of the Supreme Court of California, *pro hac vice,* by special leave of court, with whom *Mr. Plato E. Papps* was on the brief, for petitioners.

Mr. Richard N. Chapman, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Richard W. Lund, with whom *Mr. Joseph A. Wheelock, Jr.* was on the brief, for intervenor, Lou Ehlers Cadillac.

Mr. H. Burdette Fredricks, with whom *Messrs. Henry W. Low* and *Edward A. McDermott* were on the brief, for intervenor, Thomas Cadillac, Inc.

Before: Burger, Tamm and Leventhal, *Circuit Judges.*

Burger, *Circuit Judge:* Petitioners seek review of an order of the National Labor Relations Board dismissing a complaint alleging that Thomas Cadillac and Lou Ehlers Cadillac violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by failing to recognize and bargain with the petitioning Unions.

Prior to the time Thomas and Ehlers began operations, two factory-dealerships in Los Angeles were owned and operated directly by Cadillac Division of General Motors Corporation. During the period these two factory dealerships were operated by Cadillac Division, the Machinists Union was certified as the bargaining agent for a single unit covering the operations of both outlets along with a third branch which was a used car outlet disposing of cars taken in trade by the two retail branches. The Painters Union was certified later during this period as bargaining agent for a single unit of auto body painters for both Cadillac outlets. The two Unions bargained jointly with General Motors and a single contract was made for both retail outlets. The contract provided the same wages, grievance procedures and other benefits for all employees wherever assigned, and a common seniority list covered both branches. A unique feature of the single contract provided transferability of seniority, vacation and holiday pay at all General Motors plants wherever located. All employees were covered by General Motors' pension and insurance programs. This contract was in effect when General Motors sold its outlets to the two independent franchise dealers.

While General Motors operated the Cadillac outlets in Los Angeles they were managed and administered as a single unit with a central accounting system, central personnel, credit and purchasing controls. When General Motors decided to terminate direct retail operations in Los Angeles it so advised the two Unions and subsequently reached agreement with them on the rights of the General Motors' employees.[1] Thereafter, the sale of assets and franchise agreements were separately made with the two new dealers who had no business relationship with each other.

At the time General Motors terminated its operations it employed 117 employees in service departments, 75 at what was to become the Thomas outlet and 42 at the Ehlers outlet. All were union members except three mechanics and one painter. Prior to the actual transfer of assets, the unions requested that the new dealers meet with them to "clarify the rights of the employees." Ehlers responded that this was premature and Thomas made no reply.

The new Cadillac dealers immediately began operations under separate competing franchise contracts. Thomas

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[1]In his concurring opinion, Member Jenkins stated:

> Meetings [between General Motors and] the Union resulted in a Supplement Agreement, dated April 28, 1965, which provided that, in anticipation of General Motors' closing Bixel and Wilshire, employees who left to take another job could voluntarily be laid off out of line of seniority. In addition, General Motors agreed to give employees vacation and absence pay prorated to the date of termination, lump sum payment of amounts accumulated under the General Motors Income Security Plan, retirement benefits for employees having reached the permissible retirement age of 60 and having the minimum 10 years of service, and pensions to those between the ages of 55-60 who otherwise qualified for retirement. A sizable [sic] number of employees took advantage of these provisions. (Joint Appendix 60-61).

hired a total of 63 service employees, 16 of them former General Motors employees who were union members; Thomas also hired a new supervisory staff of 7 persons only 3 of whom had worked for the former General Motors outlets. One assistant sales manager and an accounting supervisor who had woked for unrelated General Motors outlets were also hired.

Ehlers hired 11 service employees and several salesmen who had worked in the predecessor General Motors operation, Ehlers brought in former employees of his own in most supervisory posts. The Board found on undisputed evidence that both dealers hired their new staffs solely on the basis of competence and were not influenced by the union membership of job applicants. The Board also found that neither dealer had any connection with General Motors except by virtue of the franchise as a dealer.

In the face of the refusals by Thomas and Ehlers to negotiate the claims of the Unions, picketing of both dealers was commenced. The Unions made no claim to represent a majority of the employees of Thomas and Ehlers. Nevertheless, the Examiner concluded that Thomas and Ehlers were successor employers and hence required to recognize the Unions and bargain with them. The Board found this determination to be erroneous and held that Thomas and Ehlers did not take over or succeed to the General Motors bargaining unit. In concluding that the new franchise dealers did not take over or succeed to General Motors' bargaining unit the Board relied on the changes in structure, organization management, and employees, and the alterations in the relationship of the two retail outlets to each other, to General Motors, and to the public.

The record amply supports the Board's determination that Thomas and Ehlers selected new employees on the basis of skill, ability and experience "and were in no way influenced by union membership of the job applicant." Even a cursory comparison of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, General Motors and unrelated, whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers. Thomas and Ehlers compete with each other for sales to customers while the General Motors managed enterprise was relatively indifferent in the sense that General Motors did not have the same interest in competing with franchise Cadillac dealers as do Thomas and Ehlers. As noted, management, accounting, and advertising were centrally controlled under the factory management but are totally separate and independent after the new franchise dealers took over.

Once Thomas and Ehlers took over, no common seniority was feasible and no transfers from one establishment to the other—or to an unrelated General Motors operation—were available. Thomas and Ehlers each established a new management and supervisory hierarchy. Each was free to fix wages and working conditions subject only to the normal competition for skilled service personnel in the local labor market. From a management point of view, given the fiercely competitive nature of retail auto sales, each enterprise was now "on its own"; attitudes on sales and perform-

ance which might have been tolerable to General Motors would not be acceptable to independent dealers.

A comparison of these factual aspects indicates at once that this record is clearly distinguishable from successorship cases cited by the petitioners. *See, e.g., K. B. & J. Young's Supermarkets, Inc. v. NLRB,* 377 F. 2d 463, 466, 65 LRRM 2369 (9th Circ. 1967). These comprehensive changes, and others we deem it unnecessary to detail, furnish support for the Board's determination that no successorship existed. To have concluded otherwise would have deprived the new employees of Thomas and Ehlers—a majority of whom had no prior affiliation with Petitioners—of rights guaranteed them by Section 7 of the Act to be represented by an agent of their own choice.

It should be noted that the Board's finding of nonsuccessorship did not turn on the fact that a majority of the new employees were not members of the old bargaining unit; if the composition of the unit was the controlling factor in determining successorship, a purchaser might well seek to avoid application of the successorship principle by refusing to hire the seller's employees.[2] Of course, if the purchaser deliberately sets out to destroy a union when he takes over a going business other consequences of a violation of the Act might well arise. As previously noted, however, there is undisputed evidence on the record that Thomas and Ehler's selection of new employees to staff the significantly altered operations was based only on skill and ability, and that union affiliation played no part.

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[2] *See* Note, *Obligations of Successor Employers: Recent variations on the John Wiley Theme,* 2 Ga. L. Rev. 574, 582-86 (1968).

Our review satisfies us that the record contains substantial evidence which supports the Board's finding that Thomas and Ehlers were not successors of the General Motors' dealerships, thereby neutralizing the contention that the prior existence of a valid certification created a presumption of continued majority status which obligated Thomas and Ehlers to bargain with the Unions. The substantial non-discriminatory change in personnel found by the Board, along with the changes in operational structure, negated any such presumption. *See NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833 (9th Cir. 1964); *cf. International Union, United A., A., Temp. Wkrs. v. NLRB*, 129 U.S. App. D.C. 282, 394 F. 2d 757, *cert. denied*, 393 U.S. 831 (1968).

On substantial supporting evidence the Board found that the changes in operational format and nondiscriminatory personnel turnover negated a finding of successorship. Those findings effectively overcome the presumption of continuing majority status thereby placing on the Union the burden of making this showing. Petitioners have not claimed, nor are they able to demonstrate, this circumstance.

The petition for review is

Denied.

Leventhal, *Circuit Judge*, concurring: I concur in the majority opinion's finding of substantial evidence in the record to sustain the Board's determination in this case that these intervenors did not inherit a duty from General Motors to recognize the union as representatives of their employees after the assumption of operations at these two separate locations. As the ma-

jority opinion forcefully points out, there is a significant difference in business objective between the independent Thomas and Ehlers dealerships, on the one hand, and the General Motors factory-affiliated service establishment, on the other, and this is a telling factor.[1]

I add a separate statement to obviate the possibility that some languge in the majority opinion be extended so as to choke the Board in its evolution of sound successorship doctrine. It is with some diffidence that I speak further to this point at this time, but I am comforted as I approach the task by the reflection that if what I have to say merits amendment, it may at least help others in the delineation of their thoughts. This subject of successorship is shrouded in somewhat impressionist approaches, if I may judge from oral argument. Analysis that is clear and realistic is welcome in all areas of law, of course, but is particularly valuable in regard to "successorship" doctrine. For this is a multi-faceted concept that, properly applied, may permit and even facilitate orderly transfers of capital and assets that take due account of appropriate interests of employees and thus by providing transitions with a minimum of disruption may advance the cause of industrial peace.

1. The purchaser of a business does not take title unencumbered by the labor relations obligations of his predecessor. He is well advised to analyse labor title as much as real title. Rooted in our competitive enterprise system is a strong policy in favor of free transfer

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[1]An interesting comparison is found in NLRB v. Alamo White Truck Service, Inc., 273 F.2d 238, 241 (5th Cir. 1959).

of assets and flexibility of new management attuned to economic efficiency. This is not, however, an absolute value. It must be balanced against the policies of protection for labor and stability of labor relations that are embodied in the federal labor statutes.[2] Under the policies of these laws the new owner does not start with a completely blank slate. There is law as well as economic appraisal underlying the reality that the value of a going business is affected by existing personnel arrangements and practices, whether there is enhancement or diminution in good will value.[3]

2. I am particularly concerned lest some of the language in the majority opinion may be taken to indicate that the acid test of "successorship" is whether the work force of the old enterprise is carried over to the

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[2]*See generally,* Barbash, Status of the Collective Bargaining Agreement Under Wiley v. Livingston: A Management Counsel's View, New York University, Eighteenth Annual Conference on Labor 259 (1966); Feller, Status of the Collective Bargaining Agreement Under Wiley v. Livingston: A Union Counsel's View, New York University, Eighteenth Annual Conference on Labor 277 (1966); Note, The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston, 82 Harv. L. Rev. 418 (1968); Note, Obligations of Successor Employers: Recent Variations on the John Wiley Theme, 2 Ga. L. Rev. 574 (1968); Comment, Successor Employer's Obligation to Remedy Unfair Labor Practices, 68 Colum. L. Rev. 1602 (1968).

[3]Thus a purchase of a business may be called upon to remedy unfair labor practices of the prior owner. *See, e.g.,* U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968). The court took pains to recognize U.S. Pipe's status of "good faith purchaser" but held, nevertheless, that its freedom of action was limited by the policy of the Labor Acts. As the court pointed out, the balance between freedom for the purchaser and fairness to the employees must be struck in equitable terms: whether the requirement of bargaining (or reinstatement as was the issue in *U.S. Pipe*) is necessary to protect employees and whether there is an undue encroachment on the successor's freedom. 398 F.2d at 547-48.

new company. While that fact may be significant for certain situations, it ignores the substantial interest of employees in "protection . . . from a sudden change in the employment relationship." *See John Wiley & Sons v. Livingston,* 376 U.S. 543, 549 (1964).[4] Employees of the old enterprise may, for some limited purpose, stand in a relationship to the owners of the new enterprise that has some protection during the hiatus between the time of sale and actual take-over. They are not necessarily to be equated with strange applicants fore employment in the new enterprise.[5] It is not needful, perhaps not even appropriate, for me to delineate

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[4]The search for continuity in the retention of employees may be appropriate where the issue is successorship for the purpose of establishing a duty to arbitrate under a contract, *compare* United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964) *with* Retail Employees Local 954 v. Lanes of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966). It may also be controlling on the question of whether a duty to bargain with the union exists after the take-over. See *infra.*

[5]*See* Chemrock Corp., 151 N.L.R.B. 1074, 1078 (1965), where the Board said: ". . . where . . . the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as 'employees' of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than . . . the mere applicant for employment. . . ." *See also* Martin Marietta Corp., 159 N.L.R.B. 905 (1966); *cf.* International Longshoremen's Ass'n, 158 N.L.R.B. 1687, 1697 (1966) (Member Fanning, dissenting). *Compare* the Supreme Court's approach in John Wiley & Sons v. Livingston, 376 U.S. 543, 549, which involved the question of whether the arbitration provision of a labor contract had to be honored by a succeeding employer: "Employees and the union which represents them ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as em-

the nature of the relationship nexus between the old employees and incoming management. That will depend on the shape of the facts. In some cases that can be denominated full successorship there may be a complete transfer of the duty to bargain with representatives already chosen by the employees.[6] The continuance of such a duty would depend on a finding of full successorship. This would require some retention of employees and a continuity of business purpose between the old and new enterprise. Obviously the mere transfer of assets, even on a wholesale basis, does not amount to continuity if the equipment is being put to a different industrial use.[7] Apparently less significance would be due a change in location.[8]

Where there is a continuity of business purpose there may be a preliminary and partial bargaining relation-

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ployers be balanced by some protection to the employees from a sudden change in the employment relationship." For the view that *Chemrock* is a germinal decision that "presages the birth of new doctrines in order to accommodate the *Wiley* decision with Board law," see Sangerman, The Labor Obligations of a Successsor to a Unionized Business, 19 Lab. L.J. 160, 177-78 (1968).

[6]*See e.g.*, Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir. 1967). The obligations of subsequent management depend on the extent of identity and continuity between the old and new enterprise and the timing of labor's demands. Arbitration, bargaining, remedying unfair labor practices of the seller, and engaging in preliminary discussion impose different burdens on new management and the degree of continuity required to trigger these obligations varies. *Compare* Note, The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley v. Livingston, *supra*, note 2, at 429.

[7]*Compare* Northwest Galvanizing Co., 168 N.L.R.B No. 6 (1967).

[8]If the business is carried on in the same location, this is persuasive evidence of some continuity. *Compare* Piano & Musical Instrument Workers Union v. W. W. Kimball Co., 379 U.S. 357 (1964), *reversing per curiam* 333 F.2d 761 (7th Cir. 1964). The Seventh Circuit had relied on the shift in locale as a factor

(This footnote is continued on the next page)

ship during the transition period even though, for all the parties can know, there will ultimately be such a change, made in good faith, that there will not be a "full successorship" and that the previous choice of representative by the employees will no longer be valid.

The subject of such preliminary bargaining may include matters such as preferences for certain employees should the purchasing enterprise choose to retain workers with the skills possessed by the seller's employees. This is a matter of particular concern to the employees and the union. *See* Martin Marietta Corp., *supra* note 5; *Compare International Longshoremen's Ass'n,* Member Fanning's dissenting opinion, *supra* note 5.[9] While the union might properly insist on the right to participate in a responsible and prompt fashion in negotiations preliminary to the opening under new management, the union, of course, would not be entitled to drag out the preliminary bargaining process.

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negating a finding of successorship. *Compare also* Northwest Galvanizing Co., *supra* note 7, where the Board noted:

> "We deem it highly significant that Respondent here did not purchase a business, but purchased for addition to its already existing business the equipment utilized as a small part of the overall . . . operation. This is not a case in which the buyer assumes control of the seller's business and later decides to move elsewhere. The equipment purchase was part of a long term expansion program of Respondent which temporarily utilized the premises of the seller of that equipment until its own facilities were sufficiently expanded to permit consolidation thereof with its own identical operations."

[9] *Compare* K. B. & J. Young's Super Markets, Inc. v. NLRB, 377 F.2d 463, 466 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967), where the court said "John Wiley & Sons v. Livingston, . . . establishes that where there is substantial continuity of identity in the employing enterprise a change in ownership does not, by operation of law, automatically terminate all rights of the old employees and that such rights remain the leigitimate subject of dispute. Importantly included in such potentially bargainable issues, in our view, is continuity of employment. . . ."

3. There is always, obviously, tension between the principle of entrepreneurial freedom and economic efficiency, on the one hand, and stability of labor relations on the other. In the context of the pre-takeover situation the balance is particularly delicate. The existence and extent of duty to bargain will depend on the circumstances and issues involved, and its delineation is properly a matter for the Board in the first instance. The manifest difficulties call to mind what the Supreme Court said in *Fibreboard Paper Pds. Corp. v. NLRB*, 379 U.S. 203:

> . . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations. (p. 214)

4. In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motors' employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.

This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force. Before the new enterprise selects its employees, it can, of course, bargain with the representatives of the old employee group without any conflict with principles of self-determination. However, an order from the Board directing Ehlers and Thomas to bargain with the union as the representative of their

current employees might very well have undercut the principle of employee free choice that lies at the very heart of the Labor Acts. The cases involving the presumption of full continued majority status for a certified union are primarily instances where the purchasing enterprise has retained all or most of the old employees.[10]

On balance I think the Board was within its discretion in rejecting the Union's contention and concluding that here the new enterprises lacked the substantial identity and continuity of business purpose that required continued recognition of the union as employee representative after the new concerns and new rosters took over operations. The changes in method of operation, including significantly the change from the sheltered manufacturer-connected facility to the independent distributor orientation, and the substantial dissimilarities in personnel rosters, arrived at without discrimination against the old employees, support the Board's conclusion.[11]

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[10] *Compare* Overnite Transp. Co. v. NLRB, *supra* note 6, where the court upheld a Board finding that the purchasing company violated the Labor Acts by making unilateral changes in terms of employment after assuming managerial responsibility. The duty to bargain with the union attached immediately after take-over since there were "no significant changes . . . in operation" and the company had offered employment to all of the employees in the former unit. 372 F.2d at 768. In the case before us the old employees constituted a minority of the new work force. *Compare* also NLRB v. John Stepp's Friendly Ford, Inc., 338 F. 2d 833 (9th Cir. 1964) (no duty to bargain after take-over where there is "substantial change in the identity of work force."); NLRB v. Alamo White Truck Service, Inc., *supra* note 1.

[11] This would not be the case where the purchaser refused to hire the old employees simply for the purpose of avoiding recognition of the union. *See, e.g.*, K. B. & J. Young's Super Markets, Inc. v. NLRB, *supra* note 9.

APPENDIX "B".

Decision and Order.

On May 17, 1966, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions and supporting briefs; the Charging Parties filed a brief in support of the Trial Examiner's Decision; and the General Counsel filed a Memorandum in support of the Trial Examiner's Decision and a statement of position.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts only those findings, conclusions, and recommendations of the Trial Examiner consistent with this Decision and Order.

The Trial Examiner found that Thomas Cadillac, Inc., herein referred to as Thomas, and Lou Ehlers Cadillac, herein referred to as Ehlers, were successors to the Cadillac Motor Car Division, General Motors Corporation, Los Angeles Branch, herein referred to as GM, and thus were required to recognize and to bargain

[1]In view of our disposition herein, we find it unnecessary to pass upon the Respondents' requests for oral argument, or Respondent Ehler's Motion for the Board to take judicial notice of a related Section 301 court proceeding and the Unions' Answer thereto.

jointly with the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paper Hangers of America, AFL-CIO, herein referred to as the Painters, and the International Association of Machinists, District Lodge 94, AFL-CIO, herein referred to as the Machinists. He based his finding of successorship upon the factual determination that the "employing industry" as it existed before the acquisition by Thomas and Ehlers of GM's Los Angeles sales locations remained the same; namely, the sale of Cadillac motor vehicles, parts and accessories, and the service of such vehicles by former GM employees. He did not find controlling the facts that the transfers of operations were bona fide business transactions carried out at "arm's length," or that only a minority of GM's service unit employees were hired by Thomas and Ehlers. Nor did he place any significant weight on the special factual situation that Thomas' and Ehlers' predecessor was GM, a large corporate enterprise, or that two separate and competing franchise dealers took over locations of a prior multi-branch unit.

The Respondents contend, in pertinent part, that they are not successors to GM, and are in effect new and independent business entities, markedly different from the former GM operation. Ehlers and Thomas contend that they have no obligations to deal with the Unions, or to assume the Unions' contract with GM, and in no way led GM, the Unions, or the employees to believe that they had such obligations. All employees, they argue, including former GM employees, were hired on the basis of merit without regard to prior union membership, and they assert that the contract unit no longer

exists. For the reasons discussed below, we find merit in the Respondents' contentions that they are not under any obligation to bargain with the Unions herein involved.

The record shows that, in 1949, GM opened a branch retail sales outlet for the sale of Cadillac motor vehicles, parts, and accessories and the servicing of such vehicles at West Seventh Street (Bixel), and, in 1954, opened a similar branch at Wilshire Boulevard (Wilshire), in Los Angeles, California. In addition, GM also operated, as part of its sales operation in the Los Angeles area, a used car lot at South Vermont. Pursuant to a consent-election agreement, the Machinists was certified on August 1, 1957, for a single unit consisting essentially of all shop employees, including painters, at both the Bixel and Wilshire locations. A collective-bargaining agreement was executed between GM and the Machinists on October 17, 1957, to expire in October 1958, covering the employees at both locations.

On November 6, 1958, the Painters was certified after a Board-conducted election, for a single unit of auto body "painters" at both the Bixel and Wilshire locations. Thereafter, the Machinists and Painters bargained jointly with GM for a single collective-bargaining agreement covering the units represented by both Unions. The current contract was executed on December 1, 1964, and was to remain "in full force and effect without change until December 1, 1967." The Agreement covering the two locations provided for common wages, fringe benefits, and grievance procedures. Common seniority lists were maintained by occupation, and there was no loss of seniority in transfers between occupations under the conditions set forth in the contract. In

other ways the contract provisions treated the two branches as a single multiplant unit.

GM decided to cease the retail sale of Cadillac automobiles in Los Angeles in January 1965, and determined to transfer its operations to independent franchise dealers. On May 10, 1965, GM advised the Unions by letter that on June 1, 1965, Thomas would take over the Bixel location and Ehlers would take over the Wilshire location. The following week, the Unions separately requested Ehlers and Thomas to meet with them "to clarify the rights of the employees" of GM. The Unions were informed that the question of recognition was premature. On May 28, 1965, all employees in the bargaining unit were terminated by GM.

Prior to May 28, 1965, GM employed approximately 117 employees in the contract unit, referred to as "service departments." At Bixel there were 75 such employees, and all mechanics except 2, and all painters, except 1, were members of their respective unions; at Wilshire there were 42 such employees in the unit, and only 1 mechanic was not a union member.

Thomas and Ehlers commenced operations as franchised Cadillac dealers on June 1, 1965, as competing enterprises. Former GM service employees were required, the same as other applicants, to submit applications for employment before being interviewed. Of the 63 service department employees hired by Thomas, only 16 were former GM employees, including 1 painter. Out of a supervisory staff of 7, only 3 had been service supervisors for GM. A used car salesman for GM became an assistant used car manager. GM's Los Angeles supervisor of accounting became Thomas' business manager. Of the 35 service department employees employed

by Ehlers, only 11 were former GM unit employees; those were hired on the recommendations of GM's Wilshire service manager and foreman. Ehlers' managers consisted of Lou Ehlers as manager, two employees who had worked with Ehlers at his prior dealership as business manager and general sales manager, respectively, and a former GM Wilshire employee as new car sales manager. In the service department, the service manager and the foreman were not the same individuals who had previously held such positions when GM operated Wilshire. Respondents' contention that employees were hired on the basis of ability is uncontroverted.

In view of the foregoing facts, we find that Thomas and Ehlers did not take over or succeed to GM's bargaining unit. As indicated above, neither employed a significant number of service employees who had worked for GM, and the supervisory hierarchy bears little resemblance to that formerly existing under GM. Moreover, it is clear that both Thomas and Ehlers selected their employees herein involved on the basis of skill and ability, and were in no way influenced by union membership of the job applicant. Accordingly, in the circumstances, the Respondents had no obligation to bargain with the Unions with respect to terms and conditions of employment of employees formerly employed by GM, or with respect to those employees whom they hired after taking over the separate dealer franchises.[2]

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[2]Cf. Overnite Transportation Co. v. N.L.R.B., 372 F. 2d 765 (C.A. 4).

We therefore find that the Respondents have not violated Section 8(a)(1) and (5) of the Act,[3] and we shall order the complaint be dismissed on its entirety.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. Mar. 29, 1968.

FRANK W. McCULLOCH, Chairman
JOHN H. FANNING, Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS
Board

(SEAL)

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[3]Member Fanning also agrees with the concurring opinion of Member Jenkins.

[4]In view of our conclusions above, we deem it unnecessary to pass upon certain other findings and recommendations of the Trial Examiner to which the parties have taken exceptions.

Member Jenkins, concurring:

I aree with my colleagues that the complaint in this case should be dismissed. I also agree with their conclusion that neither Thomas nor Ehlers is a successor employer to the original General Motors retail enterprise at the Bixel and Wilshire locations in Los Angeles, California. However, in reaching this conclusion, in addition to those facts relied on by my colleagues, I also rely on the totality of the evidence present in the record including evidence relating to those events and actions of the parties both before and after Thomas and Ehlers commenced operations as competing franchised Cadillac dealers on July 1, 1965.

I find it significant that the transfer of operations were bona fide business transactions carried out at "arm's length" and that prior to the transfer GM not only notified the Machinists and Painters concerning the contemplated change, but met, discussed, and bargained with the Unions regarding the change. Thus, early in 1965, GM wrote the Machinists and Painters concerning the contemplated change to arrange meetings to discuss the results of the transaction. Meetings with the Unions resulted in a "Supplement Agreement," dated April 28, 1965, which provided that, in anticipation of GM's closing Bixel and Wilshire, employees who left to take another job could voluntarily be laid off out of line of seniority. In addition, GM agreed to give employees vacation and absence pay prorated to the date of termination, lump sum payment of amounts accumulated under the GM Income Security Plan, retirement benefits for employees having reached the permissible retirement age of 60 and having the minimum 10 years of service, and pensions to those between the

ages of 55-60 who otherwise qualified for retirement. A sizable number of employees took advantage of these provisions.

I also find significant that the day-to-day operational practices of Thomas and Ehlers differ not only from each other but from GM. Unlike GM, neither uses a janitorial nor guard service, but hired their own employees for this work. GM had four car attendants in the unit that picked up and delivered customers' cars. This service was discontinued. GM did all its own body work, while both Thomas and Ehlers contract out some body work. GM maintained a used car lot and disposed of most car trade-ins itself. The operations of this lot was discontinued on May 28, 1965, by GM, and Thomas and Ehlers now dispose of most car trade-ins through wholesalers. The Respondents also use sources of financing in the sale of new cars different from GM's sources.

Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. I do not think this factor can be ignored. GM's Los Angeles sales outlets, unlike those of Respondents, were intimately tied in with its entire nationwide manufacturing and sales operations. Thus, the controller, the purchasing agent, the personnel manager, the supervisor of accounting, used car manager, and credit manager while located at the Bixel location were carried on GM's Detroit payroll, and were subject to Detroit's overall direction and supervision. Indeed, GM's agreement with the Unions was patterned after its nationwide contract with another union. Also, under the contract covering GM's operation herein in-

volved, an employee continued to accrue seniority thereunder while employed in any GM plant on national defense work. The holiday, vacation, and paid absence eligibility computations were based upon employment in any GM plant. The contract also included GM's national Pension Plan, Insurance Program, and Income Security plan. Bixel and Ehlers, of course, operate as independent and competing entities.

Thus, while I agree with my colleagues that Thomas and Ehlers did not succeed to the business operated by GM, and that the operations at Bixel and Wilshire are not the same "employing industry" as that engaged in by GM, I do so on the totality of the evidence and not upon the more narrow factual grounds set forth in their opinion.

Dated, Washington, D. C.

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS
BOARD

APPENDIX "C".

Trial Examiner's Decision.

Upon charges filed by the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America. AFL-CIO, herein referred to as the Painters, and the International Association of Machinists, District Lodge 94, AFL-CIO, herein referred to as the Machinists, the Regional Director for the National Labor Relations Board's Thirty-first Region caused to be issued an order of hearing dated November 30, 1965, in which Thomas Cadillac, Inc., herein referred to as the Respondent Thomas, and Lou Ehlers Cadillac, herein referred to as the Respondent Ehlers, were named Respondents. The complaint charged that the Respondents were each violating Sections 8(a)(1) and (5) of the National Labor Relations Act, herein referred to as the Act.

The Respondents in separate answers generally denied that they had engaged in any of the unfair labor practices alleged in the consolidated complaint.

Pursuant to due notice this case came on to be heard before the undersigned Trial Examiner, Lowell Goerlich on February 23, 24, 25 and 28, 1966, at Los Angeles, California. All parties participated fully in the hearing and each party was offered an opportunity to be heard to call, examine, and cross-examine witnesses, to argue orally upon the record, to submit proposed findings of fact and conclusions of law and to file briefs. All briefs have been reviewed and considered by the Trial Examiner.

The principle issues raised by the parties were:

1. Whether the Respondents Thomas and Ehlers, as successors, refused to bargain collectively with the Machinists and the Painters in violation of Section 8(a)(5) of the Act.

2. Whether the Respondents Thomas and Ehlers violated Section 8(a)(5) of the Act in that each Respondent refused to honor the collective bargaining agreement executed between their predecessor and the Machinists and the Painters.

Upon the whole record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondents

Cadillac Motor Car Division, General Motors Corporation, (a Delaware Corporation) Los Angeles branch, herein called General Motors, prior to May 29, 1965, operated two retail Cadillac sales and service agencies, to wit, one located at 5151 Wilshire Boulevard, and one located at 1076 West Seventh Street, both in Los Angeles, California. At each of these locations, in the course and conduct of its business operations, General Motors annually did a gross volume of business in excess of $500,000. At each of these locations, General Motors annually received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

Respondent Ehlers is a California corporation incorporated on May 19, 1965. After June 1, 1965, its offices and principal place of business has been located at 5151 Wilshire Boulevard, Los Angeles, California

and since June 1, 1965, Respondent Ehlers has operated as an authorized dealer for the retail sales and services of Cadillac motor vehicles at such location. Respondent Ehlers is, and has been since June 1, 1965, the successor to General Motors at General Motors' location at 5151 Wilshire Boulevard, Los Angeles, California.

Respondent Ehlers, in the course and conduct of its business operations, in the 12-month period ending June 1, 1966, will do a gross volume of business in excess of $500,000 and will, during the same period, purchase and receive goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent Ehlers is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent Thomas is a California corporation. After June 1, 1965, its offices and principal place of business has been located at 1076 West Seventh Street, Los Angeles, California, and since June 1, 1965, Respondent Ehlers has operated as an authorized dealer for the retail sales and service of Cadillac motor vehicles at such location. Respondent Thomas is, and has been since June 1, 1965, the successor to General Motors at General Motors' location at 1076 West Seventh Street, Los Angeles, California.

Respondent Thomas, in the course and conduct of its business operations, in the 12-month period ending June 1, 1966, will do a gross volume of business in excess of $500,000, and will, during the same period, purchase and receive goods valued in excess of $50,000 directly from suppliers located outside the State of

California. Respondent Thomas is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organizations

The Machinists and the Painters are labor organizations within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. Statement of pertinent facts

Until May 28, 1965, General Motors operated branch retail stores for the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California.[1] The West Seventh street branch commenced business in 1949. The Wilshire Boulevard branch opened in 1954. In the operation of these branches General Motors' relation to the general public was substantially the same as that of any dealer authorized by General Motors[2] to engage in the sale and service of new Cadillac motor vehicles.

On August 1, 1957, International Association of Machinists, for and in behalf of District Lodge #94, Local #1086, AFL-CIO, after a representation election was certified for the following unit of General Motors' employees at its West Seventh Street and Wilshire Boulevard branches:

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[1]General Motors also operated a used car lot at 501 Vermont Street, Los Angeles, which was discontinued on May 28, 1965.

[2]General Motors through its Cadillac Division manufactures and assembles Cadillac motor vehicles, at Detroit, Michigan, which are offered to the general public through franchised dealers. The Respondents are among its franchised dealers.

> All employees, excluding all new and used car salesmen, service salesmen, office clerical employees, shop clerks, pick-up drivers—parts, and pick-up and delivery man, and guards, supervisors and professional employees as defined in the Act.

A collective-bargaining agreement was executed between General Motors and the Machinists on October 17, 1957. The agreement by its terms continued "in full force and effect without change until October 17, 1958." Painters were included under the Agreement.

On November 6, 1958, after a representation election the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, was certified for the following unit of General Motors' employees at its West Seventh Street and Wilshire Boulevard branches:

> All employees employed in the classification "painter" excluding all foremen and other supervisors within the meaning of the amended Act; all guards and professional employees within the meaning of the amended Act; all office clerical employees and all other employees and all other employees not specifically included in the unit.

The current collective-bargaining agreement was executed by and between General Motors and both certified Unions on December 1, 1964. By its terms the agreement continues "in full force and effect without

change until December 1st, 1967."[3] (Emphasis added) In the agreement General Motors recognized the Machinists for a unit of employees embracing the West Seventh Street and Wilshire Boulevard branches as follows:

> All mechanics, polishers, washers, lubricators, garage attendants, body and fender men, machinists, elevator operators, trimmers, and maintenance but excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager, general foreman, foreman, assistant foreman, inspectors, timekeepers, shop clerks, service salesmen, office clerical employees, new and used car salesman, tower operator, pickup drivers-parts, pick-up and delivery men,[4] guards, operating engineers, supervisors, clerical employees, G.M. Tech students, and work dispatchers.

In the same agreement General Motors recognized the Painters for a unit of employees embracing the West Seventh Street and Wilshire Boulevard branches as follows:

> All painters excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts

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[3]The agreement also provided that if either party failed to give notice to terminate or modify the agreement, "the Agreement shall continue in effect from year to year after December 1st, 1967, subject to termination by either party on 60 days' written notice prior to December 1st of any subsequent year."

[4]Although excluded from the unit description pick up and delivery men were included, in fact, in the coverage of the agreement.

manager, assistant parts manager, general foreman, foreman, assistant foreman, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pick-up drivers-parts, pick-up and delivery men, guards, operating engineers, supervisors, clerical employees, G.M. Tech students and work dispatchers.[5]

Among other things the Agreement provided for voluntary dues deduction and that an employee who was a member of the Union upon the effective date of the Agreement "shall continue membership in the Union for the duration of [the] Agreement." Employees who were not members of the Union at the time the Agreement became effective were required to become members of the Union "within ten (10) days after the thirtieth (30th) day following the effective date of [the] Agreement or within ten (10) days after the thirtieth (30th) day following employment whichever [was] later." Compliance with these conditions required "paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union."

The Agreement provided for the referral of certain grievances[6] to an "impartial umpire" from whose deci-

[5]The units are sometimes referred to herein as the "contract units."

[6]The Agreement provides "It shall be the function of the Umpire, after due investigation and within thirty (30) days after submission of the case to him, to make the decision in all claims of discrimination for union activity or membership, and in all cases of alleged violation of the terms of this Agreement or supplements thereto in regard to recognition, representation, grievance procedure, seniority, disciplinary layoff and discharge,

sion "[t]here shall be no appeal" and whose decision "will be final and binding on the Union and its members, and the employee or employees involved and the Company." The Agreement also contained a no-strike clause.

On January 12, 1965, General Motors advised the Unions by letter that it was in the process of reconsidering its policy of operating its own Cadillac agencies and that it was contemplating the transfer of its West Seventh Street and Wilshire Boulevard branches to independent dealers. On May 10, General Motors advised the Unions by letter that the Respondent Thomas and the Respondent Ehlers would take over the West Seventh Street branch and the Wilshire Boulevard branch respectively on June 1, 1965. Thereafter the Unions, by their attorneys, addressed letters to the two Respondents. By letter dated May 17, 1965 the Unions requested the Respondent Thomas to meet with their representatives on May 24, 1965, at 10 a.m.[7] By letter dated June 3, 1965, the Unions requested Respondent Thomas to "submit to arbitration the question of whether it was bound under the terms of any labor

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working hours, leaves of absence, union bulletin boards, strikes and stoppages, vacation pay, holiday pay, Article X, Sections 2, 3, 4 and 5, and any alleged violations of written local or national agreements. . . . Any case appealed to the Umpire on which he has no power to rule shall be referred back to the parties without decision."

[7]The letter in part stated, "The employees at the Wilshire branch (by letter dated May 18, 1965, such reference was corrected to refer to the West Seventh Street branch) and the above unions are concerned that this change of ownership will not adversely effect them. . . . In order to clarify the rights of the employees and above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience. . . ."

agreement with the Machinists and Painters Unions." Respondent Thomas failed to respond to the requests.

By a letter dated May 19, 1965, the Unions requested Respondent Ehlers to meet with their representatives "on Friday afternoon, May 21, 1965, on Monday, May 24, at 3 p.m., or thereafter."[8] By letter dated June 3, 1965, the Machinists requested Respondent Ehlers to "arbitrate the question as to whether the existing contract is binding upon him" and by letter dated June 8, 1965, the Painters requested that the "application of the Agreement" to Ehlers be submitted to arbitration in accordance with the Agreement. Ehlers declined the Unions' request for arbitration; nor did it recognize and bargain with the Unions.

Shortly prior to May 28, 1965, General Motors employed 117 employees in the contract units, sometimes referred to as the service departments. Of these employees 75 were employed at the West Seventh Street branch and 42 at the Wilshire Boulevard branch.[9] Each branch was supervised by a branch manager who reported to the Los Angeles branch manager. The Los Angeles branch manager was the highest local authority over the two branches and reported directly to the Cadillac Division in Detroit, Michigan. The Los Angeles

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[8]The letter in part stated, "In order to clarify the rights of the employees and above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your earliest convenience."

[9]At the Wilshire Boulevard branch all employees represented by the Machinists were members of the Machinists except one employee. All employees represented by the Painters were members of the Painters. At the West Seventh Street branch all employees represented by the Machinists were members of the Machinists except two employees. All employees represented by the Painters were members of the Painters except one employee.

branch manager was located at the West Seventh Street store as were the controller, the purchasing agent, the personnel manager, the supervisor of accounting, the used car manager and credit manager. Some of these employees were carried on General Motors' Detroit payroll. While there were apparent interrelationships between the operations of the West Seventh Street and the Wilshire Boulevard branch, J. R. Toombs, supervisor of accounting for General Motors, testified that he recalled but one instance in his 15½ years of employment where there had been an interchange of an employee between the two branches. Each of the service departments were assigned separate services managers and new employees were hired by the service supervisors of the respective branch for their departments. Separate balance sheets were kept for each branch. Inter-branch accounts were maintained for transactions between branches. Each branch possessed independent performance capability and was self-contained and self-supporting from the standpoint of equipment, tools and other materials. Each branch had its own complement of employees and supervisors. Separate payrolls were kept at each branch and each branch maintained its own timeclocks and timecards. The premises occupied by each branch was separately leased.

Commencing in March 1965,[10] LaRue Thomas began negotiating with General Motors relative to procuring a franchise for the West Seventh Street branch and relative to purchasing certain designated assets of General Motors at its West Seventh Street branch. During

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[10]The initial contracts were between LaRue Thomas and General Motors. Later LaRue Thomas assigned his interest to Respondent Thomas.

the negotiations LaRue Thomas was apprised by General Motors that a labor agreement was in existence between General Motors and the Unions, but was advised by General Motors that there were no successor rights in the Agreement and that Thomas would not be bound by it.

On May 11, 1965, General Motors and LaRue Thomas executed a buy and sell agreement wherein among other things it was agreed that:

(1) General Motors would discontinue all of its Cadillac retail sale and service operations conducted at the West Seventh Street branch and execute with Thomas a "Cadillac Direct Dealer Selling Agreement" with a term of 5 years.

(2) General Motors would lease or sublease the premises occupied by the West Seventh Street branch.

(3) Unamortized leasehold improvements would be assumed by Thomas.

(4) Thomas would purchase:

(a) General Motors' fixed assets including machinery and shop equipment, parts and accessory equipment, furniture and fixtures and service cars.

(b) Company cars used for demonstration purposes and used cars used or acquired by General Motors in connection with its branch operations.

(c) All new and unused Cadillac motor vehicles.

(d) All unused and undamaged Cadillac parts.

(e) All unused and undamaged Cadillac accessories.

(f) All other unused and undamaged Cadillac parts and accessories.

(g) Special tools.

(h) Gas, oil and grease, new tires and tubes.

(i) Paint materials.

(j) Undercoating.

(k) Miscellaneous supplies and materials.

(5) Thomas would purchase all trade accounts receivable.

(6) General Motors would assign to Thomas "all the right, title and interest of [General Motors] in and to Sublet Repairs and Work-in-Process" at General Motors' branch operation.

(7) General Motors would assign all unfilled retail orders for Cadillac motor vehicles.

(8) Thomas agreed "to assume and discharge all liabilities with respect to warranties on new cars and to assume responsibilities for making policy adjustments on new cars delivered by [General Motors'] Branch Operations. . . .

The Direct Dealer Selling Agreement or Franchise Agreement referred to granted Respondent Thomas the "non-exclusive privilege of selling new Cadillac motor vehicles, parts and accessories. . . ." Among other things the Agreement required Thomas to furnish General Motors every month with an estimate of its requirements for new Cadillac motor vehicles for the next 3 months and "every ten (10) days with a sales report." Under the Agreement Thomas was required to set and maintain an "owned net working capital" satisfactory to General Motors. Thomas also was required to "provide satisfactory sales performance and render satisfactory service to owners" and "receive, investigate and handle all complaints received from owners of Cadillac motor vehicles with a view of securing and maintaining good will of the public toward Dealer, Cad-

illac and Cadillac motor vehicles". Unremedied complaints were to be reported promptly to General Motors. Thomas was restricted from making any "misleading statements or misrepresentation as to items making up the total selling price of a new Cadillac motor vehicle." Under the Agreement General Motors was entitled to an examination of Thomas' accounts and records "to assure the maintenance of an accounting system of a type designated" by General Motors. Respondent Thomas was required to maintain a standard product sign and a standard authorized service sign. The Agreement reserved to General Motors the right to terminate the Agreement if Respondent Thomas did not conduct its business in conformity with the requirements of the Agreement. Upon the termination of the Agreement Respondent Thomas was obligated to sell to General Motors all new and unused motor vehicles, all unused and undamaged Cadillac parts, all unused and undamaged Cadillac accessories and service supplies and certain signs. The Direct Dealers Selling Agreement could not be assigned by Thomas without the consent of General Motors.

General Motors also agreed to discharge its "obligations and liabilities to employees employed by [General Motors] at [its] Branch Operation for vacations, vacation pay, and pay in lieu of vacation accruing through the periods of employment expiring on the closing date."[11] On June 1, 1965, General Motors assigned to the Respondent Thomas, by separate instrument, Accounts Receivable, Unfilled Retail New Car Orders with Customers Cash Deposits thereon, Sublet Repairs and

[11]On June 7, 1965, LaRue Thomas assigned his interest to the Respondent Thomas.

Work-in-Process and prepaid taxes. A Bill of sale was also executed on June 1, 1965 for the items mentioned in the Agreement of May 11, 1965, and the other provisions of May 11 agreement were complied with.

Respondent Thomas commenced operation of the Sales Department on June 1, 1965, and of the Service Department June 7, 1965, at the West Seventh Street branch and established its own salaries, wages, hours and working conditions unrelated to those of General Motors. All the service employees employed by General Motors in the contract units at the West Seventh Street branch were interviewed for employment by the Respondent Thomas and each submitted application for employment. Out of 63 employees hired for the service department 16 were former General Motors' employees; 1 had been in the Painters' unit, the others had been in the Machinists' unit. Two General Motors employees were disqualified for employment because they had reached the age of 64 years. According to LaRue Thomas employees were hired on the basis of their ability. Out of a service supervisory staff of 7, on June 7, 1965, 3 had been service supervisors for General Motors. A used car salesman for General Motors became an assistant used car manager for Respondent and General Motors' supervisor of Accounting became Respondent Thomas' business manager.

Since June 1, 1965, Respondent Thomas has operated the West Seventh Street branch and has been engaged in substantially the same business operations formerly engaged in at such branch by General Motors.

The Unions commenced picketing Respondent Thomas on June 7, 1965.

Lou Ehlers testified that in his first discussions in Detroit in March 1965 about the possibility of obtaining a Cadillac dealership in Los Angeles, he was advised that General Motors had a union agreement in its Los Angeles establishment. He was not told that the contract would become binding upon him if he took over operation of the branch. Ehlers learned prior to May 12, 1965, that the Union's agreement did not contain a successor and assigns clause. He was advised by counsel, that the labor agreement between General Motors and the Union would not be binding upon him.

On May 12, 1965, Louis W. Ehlers entered into a buy and sell agreement with General Motors relating to the Wilshire Boulevard branch. The Agreement and the details of its implementation were substantially the same as the transactions between General Motors and LaRue Thomas described above. Ehlers consummated the deal as of June 1, 1965, and an assignment to Respondent Ehlers was executed on June 7, 1965.

Respondent Ehlers commenced its operations on June 1, 1965, at the Wilshire Boulevard branch. It established its own salaries, wages, hours and working conditions unrelated to those of General Motors.

All the in-unit employees made application for jobs. These employees were reviewed for hire by General Motors Wilshire service manager Balsemann and General Motors Wilshire foreman Graham, with the object of selecting the most competent and satisfactory persons. Of the 35 service employees employed by Ehlers in June, Graham hired 11 former General Motors employees. Respondent Ehlers hired a total of 87 employees, including management and supervision, of whom 54 had

formerly been employed by General Motors at the Wilshire Boulevard branch, Ehlers' managers were Lou Ehlers as manager, two men who had worked with him at another location as general sales manager and as business manager, and a new car sales manager, a former General Motors Wilshire employee. In respect to the service department, the service manager and foreman were different individuals than those who were employed in such capacity by General Motors; however, one of them had previously worked at the Wilshire Boulevard branch. Some General Motors' work in process was completed by Respondent Ehlers.

Since June 1, 1965, Respondent Ehlers has operated the Wilshire Boulevard branch and has been engaged in substantially the same business operations formerly engaged in at such branch General Motors.

The Unions commenced picketing Respondent Ehlers on June 9, 1965.

B. Concluding Findings

First: The General Counsel contends that each Respondent is "the successor, pro tanto," of General Motors and obligated to recognize and bargain with the Unions. The crucial question in this regard is "whether the employing industry remains essentially the same after the transfer[12] of ownership." N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303 (C.A. 5).

In N.L.R.B. v. Colten, 105 F. 2d 179, 183, Judge Simons wrote:

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[12]Whether a transfer of ownership is or is not "a bona fide business transaction carried out at 'arm's length'" is immaterial in the consideration of this question. N.L.R.B. v. Tempest Shirt Manufacturing Co., 285 F. 2d 1 (C. A. 5).

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . . It needs no demonstration that the strike which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency."[13] (Emphasis supplied)

The "employing industry" as it existed before the acquisitions of the Respondent employers consisted of the operation of enterprises for the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California. After the successions these enterprises were continued at the same locations without substantial change, with the performance of substantially the same work by former General Motors employees.[14] Any deviations from the precise practices or procedures of General Motors effected by the Respondent Employers when they assumed operations were not of such a nature as to destroy the continuity and identity of the employing enterprise or alter the basic similarity of the Respondent employers' operations from those of General Motors. Moreover, by the Di-

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[13]The quoted language above from the Colten case has been often repeated by the Board. Weinberger Banana Company, Inc., 18 NLRB 787, 792; The Baldwin Locomotive Works, 20 NLRB 1100, 1110, Hooser Veneer Company, 21 NLRB 1697, 1700, and McCarron Co., 100 NLRB 1537, 1543.

[14]Although the Respondent employers put to work former employees of General Motors, under Chemrock Corp., 151 NLRB No. 111 it would appear that such fact need not be proved to establish a successorship.

rect Dealers Selling Agreement General Motors assured a continuation of the operations of the two branches along lines compatible with General Motors' directions and prior policies. The employing enterprise remained as before the acquisitions, i.e., the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles. The employing structure remained the same. Cf. Witham Buick, Inc., 139 NLRB 1209; Arbor Chevrolet Company, 93 NLRB 1376.

In Randolph Rubber Co.,[15] 152 NLRB No. 46, the Board has recently said:

> It is settled that, where there is a substantial continuity in the identity of the employing enterprise, the purchasing employer is bound to recognize and bargain with the incumbent union. In this case, Respondent took over the plant, machinery and the entire workforce[16] of the Rubber Corporation, and continued the same type of business activity—the manufacture of canvas shoes. While Respondent

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[15]In Randolph Rubber Co., supra, the union was certified in November 1953. The successor employer took over operations of the Company on November 8, 1963. A labor agreement was in effect with did not expire until 1966. Dues were deducted by the predecessor for the first week in November 1963. There was no claim that the successor employer was the alter ego of the predecessor employer.

[16]In Chemrock Corp., supra the Board said:

> "We think where, as here, the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as 'employees' of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment in the Phelps Dodge case." [Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177.]

introduced improved machines and techniques, made changes in the managerial staff, used its own trademarks, and acquired new customers, these factors did not appreciably alter the basic similarity of Respondent's operation to that of the Rubber Corporation. Upon the entire record, we find a continuity in the employing enterprise which obligated the Respondent as successor to Rubber Corporation to bargain with the Union as the incumbent representative of the employees when it assumed control of the plant in November 8, 1963.

As in the Randolph Rubber case, the continuity in the employing enterprise in the present case obligated the Respondent employers as successors to General Motors to recognize and bargain with the Unions as incumbent representatives of the employees in the unit herein found to be appropriate (see infra.) when they respectively assumed operation of the General Motors' sales establishments. See also Chemrock Corp., supra; Maintenance Inc., 148 NLRB 1299; Johnson Ready Mix Company, Inc., 142 NLRB 437; Downtown Bakery Co., 139 NLRB 1352; Witham Buick, Inc., supra; Ugite Gas Incorporated, 126 NLRB 494; Southerland's Tennessee Company, Inc., 102 NLRB 1178; and The Northwest Glove Co., Inc., 74 NLRB 1697.

Nor is the Trial Examiner persuaded that the Respondent employers are absolved from the obligations which attach to a successorship where there is a substantial continuity in the identity of the employing enterprise because the Respondent employees' predecessor was General Motors, a gigantic corporate enterprise, rather than a smaller employer such as the Respondents, or because separate successors purchased

simi-autonomous enterprises, for, under the circumstances present here "the interest of industrial peace" is as pronounced as in those kinds of successorships which have warranted the Board's concern and the imposition of the obligation to bargain. The fact that picket lines resulted from the Respondent employers' failure to deal with the Unions is evidence that such conduct was and is a source of industrial strife and was incompatible with the ends sought to be accomplished by the "application of the settled rule that the industrial strife that the Act seeks to avoid or mitigate, and the validly instituted bargaining relationship it seeks to foster, are no less an object of legislative solicitude where contract, death or operation of law brings about a change of ownership in the employing agency.'" See Miller Lumber Co., 90 NLRB 1361, 1362. Moreover, to hold the Respondent employers as successors and bound to recognize and bargain with the Union, under the facts herein, not only will foster a validly instituted bargaining relationship but will substitute collective bargaining for economic warfare[17] and tend toward the encouragement of the practice and procedure of collective bargaining. Cf. Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177, 182.

Second: The General Counsel maintains that Respondent's Thomas and Ehlers violated Section 8(a)(1) and (5) of the Act by refusing "to honor or give effect to the collective-bargaining agreement" between General Motors and the Unions executed on December 7, 1964, effective through December 1, 1967, and from

[17]In N.L.R.B. v. Lion Oil Co., 352 U.S. 282, 289 it was said that a purpose of the Act was "to substitute collective bargaining for economic warfare. . . ."

year to year thereafter, if not modified or terminated. The General Counsel grounds this conclusion upon the Supreme Court's decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543. General Counsel also cites Wackenhut Corporation v. International Union, United Plant Guard Workers of America, 332 F. 2d 954 (C.A. 9) and United Steel Workers of America v. Reliance Universal, Inc., 335 F. 2d 891 (C.A. 3). The Respondents strongly urge that these cases lend no support to the General Counsel's thesis.

The General Counsel cites no Board decisions in support of his contention. However, in K. B. & J. Young's Super Market, Inc., 157 NLRB No. 17, a Trial Examiner found that a Respondent employer's refusal to honor the contract between its predecessor and the incumbent union constituted a violation of Section 8-(a)(5) of the Act. Nevertheless, the Trial Examiner did not affirmatively order the Respondent to honor the contract to which the General Counsel excepted. In a footnote the Board said:

> In the circumstances of this case, and particularly because the union gave notice, pursuant to the provisions of the contract in question, of its desire to reopen the contract, and the union has not excepted to the Trial Examiner's failure to order the Respondent to honor the contract, we find it unnecessary to pass upon the question of whether the Respondent also violated Section 8(a)(5) of the Act by its refusal to honor its predecessor's contract."

The implication seems strong that had the facts been otherwise the Board would have found an 8(a)(5) vio-

lation in the Respondent employer's failure to honor the contract.

In the case of California Footwear Company, 114 NLRB 765, affirmed; N.L.R.B. v. Lewis, 246 F. 2d 886 (C.A. 9) the Board held that the Respondent employer's refusal to apply a bargaining agreement, its unilateral establishing of wages and working conditions which differed substantially from those required by the bargaining agreement and its refusal to recognize the Union as the representative of the employees of the alter ego successor constituted a refusal to bargain with the Union. The Board further found that the contract remained in effect until it could be lawfully terminated in accordance with the requirements of Section 8(d) of the Act. See also Butler Chemical Company, 116 NLRB 1041.[18]

In the Wiley case the Supreme Court held "that the disappearance by merger of a corporate employer which has entered into a collective-bargaining agreement with a union does not automatically terminate all rights of employees covered by the agreement, and that, in appropriate circumstances, . . . the successor employer[19]

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[18]While the California Footwear Company case, supra, and the Butler Chemical Co. case, supra, concerned alter ego circumstances, it has been pointed out in N.L.R.B. v. Tempest Shirt Manufacturing Co., supra, that it is "immaterial" whether or not the succession is "a bona fide business transaction carried out at 'arms length.'" In view of the fact that the Act seeks to avoid or mitigate industrial strife and to foster validly instituted bargaining relationships, there is no convincing basis for treating "arm's length" successions any differently than "alter ego" or "disguised continuance" successions where the applicability of a predecessor's contract to his successor is concerned. Cf. Alexander Milburn Co., 78 NLRB 747, 750.

[19]The Supreme Court's use of the term "successor employer" suggests that the Supreme Court intended that its decision cover "successorships" as well as "merger cases."

may be required to arbitrate with the union under the agreement."

In United Steel Workers of America v. Reliance Universal, Inc., supra, relying on the Wiley case, the Court held that the "collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations . . . after the change of ownership." The action concerned a successorship in which the incumbent union sought a declaratory judgment that the successor was bound by the predecessor's agreement and was obligated to arbitrate alleged grievances arising under the agreement.

In the Wackenhut Corporation case, supra, the court opined:

> . . . the policy of the national labor laws obligates Wackenhut as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant.

Referring to the Wiley case, supra, the Court commented:

> Having in view the objectives of national labor policy reflected in established principles of federal law, the Court held the described interest of the employees [the protection to employees covered by a collective bargaining agreement from sudden change in their employment relationship] outweighs that of the employer and must prevail.

The Court held:

> It follows that under the rule of Wiley, Wakenhut is bound by the collective bargaining agreement entered into by General Plant and bound thereunder to arbitrate the union grievances as ordered by the District Court.

Hence the Trial Examiner finds that Respondents Thomas and Ehlers are "bound by the collective bargaining agreement entered into by [General Motors]."[20] Such finding is wholly in harmony with the Supreme Court's teaching in the Wiley case:

> "The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'"[21]

Nor may the teachings of the Wiley case be rejected as inapplicable to the present case because it arises under the National Labor Relations Act, as amended, rather than pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 since a dominating purpose of the National Labor Relations Act, as amended, is likewise the avoidance of industrial strife. Cf. Synco Machine Company, Inc., 62 NLRB 985.

To hold that a successor is not bound that its predecessor's contract is to compel employees to resort to industrial strife to protect benefits which have accrued to them in the employing industry during the period of the predecessorship. Moreover, if such were the case, an expedient is afforded whereby employers through the sale and transfer of assets may not only avoid a con-

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[20]Obviously, disputes as to the specific application of the provisions of the agreement are left for resolution to the methods provided for in the Agreement, one of which is arbtration.

[21]The Trial Examiner's finding also concurs with the underlying objectives of the national labor relations laws "to promote collective bargaining and to help give substance to such agreements through the arbitration process." Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 265.

tinuance of their own contractual obligations but can assure to thiir successors likewise escape from such obligations. Under such a rule of law unions are encouraged to strike against the predecessor employer prior to the succession and to erect defensive roadblocks in the paths of the peaceful transition of the employing industry from predecessor to successor. Such consequences are incompatible with the Act's desired results.[22] Moreover, under such circumstances, through the happenstance of succession, employees are exposed to the loss of seniority,[23] accrued employment benefits and job security. Furthermore, employees who have reached an age[24] when their employment is not attractive to employers but whose qualifications for employment otherwise would be suitable, may be cast upon a labor market to flounder about with a strong probability that they will continue unemployed and the dregs of the labor market. Such unhappy results do violence to the humanitarian objectives of the Act and the teachings of the Court to the end that employees may be protected "from a sudden change in the employment relation-

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[22]Section 1 of the Act states "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions [industrial strife and unrest] to the free flow of commerce."

The Supreme Court has said in Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 104:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the Federal scheme to promote industrial peace.

[23]"Seniority has become of overriding importance. . . ." Humphrey v. Moore, 375 U.S. 335, 346.

[24]The Respondent Thomas disqualified two General Motors employees for hire because they had reached the age of 64 years.

ship."[25] Surely such a strained construction of the Act ought not to be indulged unless clearly compelled by the Act. Indeed the record is barren of any competent or persuasive proof that had the Respondents Thomas and Ehlers adhered to General Motors' collective-bargaining agreement detriment to them would have occurred or that General Motors employees would have been unable to perform the tasks assigned to them.[26] The language of Zdanok v. Gidden[27] Co., 288 F. 2d 99 (C.A. 2) is apposite:

> In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

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[25]In the Wackenhut case, the court said:

> What the Supreme Court did in Wiley was to balance the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer.

[26]Had General Motors employees been incapable of performing the tasks assigned to them, the Respondent employers could have sought relief under the terms of the labor agreement.

[27]The Glidden case, supra, involved a plant transfer. The employer refused to transfer certain employees to the transferred plant. Even though the collective-bargaining contract had expired the court held that the seniority rights had "vested" and "could not be unilaterally annulled." This decision demonstrates the utmost importance attached to accrued seniority rights.

In view of the teachings in the Wiley case and the Wackenhut Corp. case the "reasonable expectations" of the employees in the present case anticipated a continuation of the collective-bargaining agreement into the successorship.[28]

Accordingly by withdrawing recognition during the term of the contract and repudiating it in its entirety the Respondents Thomas and Ehlers unlawfully refused to bargain with the Unions.[29] Likewise, the Respondents' unilateral changes in working conditions in derogation of the terms of the contract were a violation of Sections 8(a)(5) and 8(d) of the Act, California Footwear Co., supra; Cf. C & S Industries, Inc., 158 NLRB No. 43.

Third: As noted above the Board certified the Machinists and the Painters for multibranch or establishment units of employees covering General Motors' West Seventh Street and Wilshire Boulevard establishments which unit descriptions were incorporated into labor agreements without substantial variance. There seems little question that on May 11 and 12, 1965, the dates upon which the buy and sell agreements were signed and Respondents became committed to operate the establishments under General Motors franchises, these

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[28]It is noted that the General Motors agreement contained no provision for its termination in event the employing industry was transferred to a successor.

[29]See Hexton Furniture Co., 111 NLRB 342, 344; California Footwear Co., supra; The Butler Chemical Co., 118 NLRB 1041; Royal Cotton Mill Company, Inc., 109 NLRB 186; Sanson Hosiery Mills, Inc., 92 NLRB 1102. In the Hexton Furniture Co., supra, the Board held that "by withdrawing recognition from the union during the middle of the contract term, the Respondent unlawfully refused to bargain with the Union."

units were appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[30] Not only were these units certified units[31] but a controlling history of bargaining in such units had been well established. The Trial Examiner finds that at the time of the succession these units were appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The multiestablishment units, except for the fact of succession, remained unchanged in any appreciable aspect after the acquisitions. Moreover, the certification of the Unions for such units ran "with the employing industry and [was] binding on [the] bona fide successor company as well as on its predecessor." The Northwest Glove Co., Inc., supra, 1700. The Board in the Northwest Glove case further opined,

> By its very nature and purpose it [the obligation to bargain] ran with the business; and it is therefore binding on the successor corporation which, with knowledge of its predecessor's obligation to bargain, took over and continued the business.

The obligation to bargain which survived the succession a force was the obligation to bargain within the appropriate unit existing at the time of the succession. Not only were the Respondent employers charged with the knowledge of this obligation but each employer had

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[30]Respondent Ehlers in its Brief states at page 12:

> The Unions were recognized by G.M. in a multi-plant unit. In view of the 1957 certification and seven years of bargaining on such basis, that is clearly the established unit.

[31]"The Board's determination of the appropriate bargaining unit should not be lightly set aside. Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485." N.L.R.B. v. Sheridan, 61 LRRM 2586 (C.A. 2).

actual knowledge of its predecessor's obligation to bargain within the multiestablishment units. Yet each employer in the face of such obligation to bargain concluded a buy and sell agreement with General Motors. Thus, having elected to buy into multibranch or establishment units, the Respondent employers stood in no different position than an employer who buys into a multiemployer unit. Cf. Downtown Bakery Corp., 139 NLRB 1352; K. B. & J. Young's Super Markets, Inc., supra. Moreover, when successor employers buy into multiestablishment units, as occurred in the present case, the stability of industrial relations which has been accomplished in such multiestablishment units and the collective and individual rights which have matured in such multiestablishment units warrant a finding that the successor employees are bound to bargain in such multiestablishment units in like manner as did their predecessor. The preservation of the status quo clearly outweighs a bifurcation of the multiestablishment units.

When Respondents Thomas and Ehlers bought into the multiestablishment units consisting of the two General Motors branches or establishments, they consented to participate in bargaining as it existed at the time of the purchase, that is, the Respondent Employers consented to be bound to bargain in the multiestablishment units. Cf. Southwestern Colorado Contractors Association, and its Members, 153 NLRB No. 75. The attempted withdrawals of Respondents Thomas and Ehlers from such multiestablishment units were untimely and ineffective. The Trial Examiner finds that the multiestablishment units continued as appropriate units for the purposes of collective bargaining after the succession and that the respondent employers are bound

to bargain collectively and jointly with the unions in such units.

Fourth: Both by reason of the successorship and the binding effect of the General Motors collective-bargaining agreement Respondent employers were obligated to recognize and bargain with the Unions in conformity with Section 8(a)(5) of the Act. The Respondents, nevertheless, claim that they are excused from this obligation in that they possessed a good faith doubt as to the Unions' majority status. While the Trial Examiner deems, a defense of the good faith doubt, under the circumstances of this case, immaterial in that the General Counsel was not required to reestablish the Unions' current majority status,[32] the record does not support a finding of such a defense for there is no competent proof that the Unions were not in fact the majority representatives during the critical period herein.

Immediately prior to the date of the succession and at the time the Unions attempted to initiate a collective-bargaining relationship, the vast majority of the employees in the contract units were paid up members either in the Painters or the Machinists respectively. Furthermore, the record is barren of any proof that these employees, who for a number of years had executed voluntary check-off authorizations, in fact, were other than voluntary members of the Unions.

In its brief the Respondent Thomas claims a good faith doubt as to the Unions' majority status in that: (1) General Motors employees when "interviewed by the

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[32]See Butler Chemical Company, supra, 1050, 1051; Hexton Furniture Company, supra; Randolph Rubber Company, Inc., supra.

service manager of Thomas none of them mentioned anything whatever about unionization or unions"; (2) "none of them at any time ever demanded that Thomas recognize the union as the bargaining agent"; (3) at no time did any of the employees demand or suggest that any contract that the Unions had with General Motors be applicable to or binding on Thomas; (4) employees hired by Thomas failed to honor the Unions' picket line placed on June 7, 1965, and "the certifications of the Unions were in excess of seven years of age"; and no independent automobile dealership is organized in the Southern California area."

Respondent Ehlers in its Brief grounded its alleged good faith doubt of the Unions' majority status upon (1) at the time of the election in 1957 General Motors employees at Wilshire voted two to one against the Union; (2) "two of the former General Motors employees volunteered that they were going to drop their union card, and another applicant stated he would not accept employment if Ehlers was a union shop"; (3) "no other automotive shops in the area were organized"; (4) Ehlers' wages were considerably higher than those in the average shop and the working conditions were superior"; (5) "Ehlers was a small, local independent dealer"; (6) "not a single employee of Ehlers, including the former General Motors employees, expressed any desire to be represented by the Unions or either of them"; (7) none of the employees ceased working for Ehlers when the picket line appeared; (8) the Unions did not assert that a majority of Ehlers' employees desired to be represented by them or "file a petition for an election."

Whether a good faith doubt entered into the Respondent employers' decisions to refuse to recognize the Unions is highly speculative since both contend that it is neither a successor nor bound by the Unions' contract. The reasons advanced sound of post-rationalization in the nature of defenses advanced to support a position which would have been pursued in any event. Nevertheless, "an employer may lawfully refuse to bargain only if it can show by objective facts that it has a reasonable basis for believing that the union has lost its majority status since its certification." United States Gypsum Co., 157 NLRB No. 60. The Board added, "it is well settled that change of ownership alone will not be sufficient to justify a refusal on the part of the new employer to bargain with the certified representative of the employees."

In Laystrom Manufacturing Co., 151 NLRB No. 144, the Board rejected an alleged doubt as to the union's majority status based upon a turnover in employees, the absence of union animosity, or independent unfair labor practices, the filing of a petition for an election and the willingness to meet with the union for the limited purpose of trying to seek a conditional contract contingent on the outcome of the election. The reasons advanced by the Respondent employers in the instant case are of similar vein and and are for the most part self-serving assertions which do not provided any objective basis for doubting the Union's continuing majority."

Moreover, a good faith doubt as to the continued majority status of a union may not be bottomed upon a loss of majority which results from the activities of

the employer. Cf. Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 687; Franks Bros. v. N.L.R.B., 321 U.S. 702.[33]

Had the Respondent employers honored their bargaining obligations which arose by reason of their successorship, as was stated in the Chemrock Corp. case, supra, the General Motors' employees "would not have been terminated without the protection afforded them through collective bargaining with their Union about their wages and the continuation of their employment" and "[t]hey would have retained their jobs at least until the Respondent had completely fulfilled its bargaining obligation, and it is well within the realm of possibility that as a result of such bargaining they might not have been terminated at all." Hence any alleged loss of majority may be attributed to the Respondent employers' refusal to assume their bargaining responsibilities, as successors. Furthermore, the Respondent employers' attitude toward recognition of the Union and its rejection of the established collective-bargaining relationship was a powerful deterrent against expressions of favor for the Union either on the part of former General Motors employees or newly hired employees. The Respondent employers, having demonstrated a rejection of the Union as a bargaining agent, could hardly expect employees of General Motors to step forward and declare their allegiance for the Unions when they did not know what criterion the Respondent employers were applying in selecting their employees.

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[33]In no event can the employer discredit a duly designated bargaining agreement by refusing to bargain with it and then avail himself of the bargaining agent's loss of majority which has thus been brought about by the employer's own conduct. N.L.R.B. v. George P. Pilling & Son Co., 119 F. 2d 32, 29.

Upon the basis of the record as a whole there is presented no competent or persuasive evidence which establishes that the Respondent employers possessed a reasonable basis for believing that the Union did not represent a majority of the employees in the contract units.

In a case concerning a successor employer, as here, fair play requires that we look to the time of the succession to determine the majority status of the Unions. Cf. N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303, 307 (C.A. 5). On May 11 and 12, 1965, Respondent Thomas and Respondent Ehlers respectively executed the buy and sell agreements with General Motors and upon such dates the Respondents respectively assumed the obligations of successors to the interests of General Motors, an event which marked the commencement of the succession. Thus, on such dates the Respondent's respective obligations to bargain arose and the Respondents became subject to the terms of the Agreement between their predecessor, General Motors, and the unions.[34] Upon such dates there is no doubt that the Unions represented a majority of the employees in the multibranch or contract units. To ignore these dates (May 11 and 12, 1965) and choose later dates upon which to determine the majority status of the Unions not only would invite the successor to adopt means for depleting the majority status but would allow the successor to subtly choose employees who were less likely to be union partisans and to choose enough new employees to exceed the number of the predecessor's employees hired.

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[34]No request by the Union was required to make the Union's unexpired agreement . . . binding on Respondent." K. B. & J. Young's Super Markets, Inc., supra.

Had the Respondent employers been inclined to accommodate the statutory purposes, the proper course would have been "to recognize the prima facie union representation of the employees and to continue to deal with the union, but petition the Board for a new election." N.L.R.B. v. Auto. Ventshade, Inc., supra 307. See also Brooks v. N.L.R.B., 348 U.S. 96, 103.[35] Having failed to follow this course the Respondent employers depicted a disregard for the Act's directives and the absence of a good faith doubt.

Upon the basis of the record as a whole the Trial Examiner finds that the Respondent employers' defense of good faith doubt as to the Unions' majority status is not well taken and that at all times critical herein the Unions represented a majority of the employees in the units found to be appropriate for the purposes of collective bargaining.[36]

IV. The effect of the unfair labor practies upon commerce

The activities of the Respondents set forth in section III, above, occurring in connection with their operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[35]In the Brooks case the Supreme Court said, "If a employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indictation that his claim [the union lacks majority status] has merit."

[36]". . . a state of facts once shown to exist is presumed to continue unless the contrary is demonstrated. . . ." Harbor Chevrolet Co., supra, 1340.

V. The remedy

It having been found that the Respondents have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act.

The Respondents shall immediately initiate collective bargaining with the Unions as the exclusive representatives of their employees in the units herein found to be appropriate, and shall immediately honor and give effect to the collective-bargaining agreement between General Motors and the Unions dated December 1, 1964, and comply with its terms retroactively commencing May 29, 1965; however, in view of the fact that the Respondent employers may have instituted more favorable wages, hours of employment or other working conditions than those negotiated in the agreement, compliance with the terms of the agreement which will cause an abandonment of or a change in any such more favorable wages, hours of employment or other working conditions shall be conditioned upon the affirmative decision of the affected employees as expressed through their collective-bargaining representatives.[37]

The Respondents, pursuant to the seniority requirements of the above agreement, shall offer all former

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[37]See Beacon Piece Dyeing and Finishing Co., Inc., 121 NLRB 953, 963. It is not intended by the recommended remedy herein to limit the parties' recourse to free and voluntary collective bargaining (which is hereby encouraged) as a means of resolving the problems which confront the parties by reason of the succession of ownership from General Motors to the Respondents. Nor is it intended that the recommended remedy impinge upon or supplant the procedures established under the agreement in respect to the resolution of any controversies relating to the interpretation or application of the terms of the agreement.

General Motors employees immediate employment in the positions to which they are entitled under the terms of the agreement, dismissing, if required, any employee hired by the Respondents since the Respondents commenced operations as the successors to General Motors, and make them whole by payment to each of a sum of money equal to that which he or she normally would have earned had the Respondents complied with the seniority provisions of the agreement from the respective dates the Respondents commenced operations as successors to General Motors to the date of the offer of employment, less their net earnings, if any, during the said period. The relief thus provided for shall be computed in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289. Interest at 6 per cent per annum shall be paid in accordance with the principle of Isis Plumbing & Heating Company, 138 NLRB 716.

Conclusions of Law

1. The Unions are labor organizations within the meaning of the Act.

2. The Respondents are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

3. All mechanics, polishers, washers, lubricators, garage attendants, body and fender men, machinists, elevator operators, trimmers, and maintenance men employed by Thomas Cadillac, Inc. at its 1076 West Seventh Street, Los Angeles, California, establishment and by Lou Ehlers Cadillac at its 5151 Wilshire Boulevard, Los Angeles, California, establishment, excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager,

general foremen, foremen, assistant foremen, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pickup drivers-parts, guards, operating engineers, supervisors, clerical employees, G. M. Tech students, and work dispatchers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

All painters employed by Thomas Cadillac, Inc. at its 1076 West Seventh Street, Los Angeles, California, establishment and by Lou Ehlers Cadillac at its 5151 Wilshire Boulevard, Los Angeles, California, establishment, excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager, general foremen, foremen, assistant foremen, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pickup drivers-parts, pickup and delivery men, guards, operating engineers, supervisors, clerical employees, G. M. Tech students, and work dispatchers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. By refusing to recognize and bargain with the Unions as exclusive bargaining agents of employees in the appropriate units, the Respondent Thomas on and since May 11, 1965, and the Respondent Ehlers on and since May 12, 1965, have engaged in, and are engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, as amended.

5. By refusing to honor and give effect to the collective-bargaining agreement between the Unions and

General Motors dated December 1, 1964, and by changing unilaterally working conditions in derogation of the terms of said agreement the Respondents, since May 29, 1965, have engaged in, and are engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5), and 8(d) of the Act, as amended.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as amended.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that each of the respective Respondents, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively and jointly with the International Association of Machinists, District Lodge 94, AFL-CIO, and the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paper Hangers of America, AFL-CIO, as the exclusive representatives of the employees in the appropriate units.

(b) Refusing to honor and give effect to the collective-bargaining agreement between said Unions and General Motors dated December 1, 1964.

(c) Changing unilaterally working conditions of their employees.

(d) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Immediately initiate collective bargaining jointly with said Unions as the exclusive representatives of the employees in the previously described appropriate units.

(b) Immediately honor and give effect to the collective-bargaining agreement between General Motors and the Unions dated December 1, 1964, and comply with its terms retroactively commencing May 29, 1965, in the manner set forth in the action above-entitled "The remedy."

(c) Offer, pursuant to the seniority requirements of the above agreement, all former General Motors employees immediate employment in the positions to which they are entitled under the terms of said agreement, dismissing, if required, any employee hired by the Respondents since the Respondents commenced operations as successors to General Motors and make them whole for any loss of pay they may have suffered, all in the manner set forth in the section above-entitled "The remedy."

(d) Notify the above-mentioned employees, if presently serving in the Armed Forces of the United States, of their right to employment upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(e) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of back-

pay due and to employment and related rights provided under the terms of this Recommended Order.

(f) Post at their respective establishments at Los Angeles, California, copies of the notice attached hereto and marked "Appendix."[38] Copies of said notice to be furnished by the Regional Director of the Thirty-first Region, shall, after being signed by a representative of the respective Respondent be posted immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Decision, what steps the respective Respondent has taken to comply herewith.[39]

Dated at Washington, D.C., May 17, 1966.

/s/ LOWELL GOERLICH
Lowell Goerlich
Trial Examiner

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[38]If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[39]If these Recommendations are adopted by the Board, this provision shall be modified to read "Notify the Regional Director for the Thirty-first Region, in writing, within 10 days from the date of this Order, what steps the respective Respondent has taken to comply herewith."

LIBRARY

In the Supreme Court of the United States

October Term, 1969

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 386

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–14) is not yet officially reported. The Board's decision and order (Pet. App. 15–23) are reported at 170 NLRB No. 92.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1969 (Pet. 2). The petition for a writ of certiorari was filed on July 25, 1969. The juridiction of this Court is invoked under 28 U.S.C. 1254(1).

361—024—69——1

QUESTION PRESENTED

Whether the Board properly found that two purchasers of automobile dealerships, which had previously been operated directly by General Motors Corporation, were not "successor employers" to General Motors and therefore were not required to assume its bargaining obligations after commencing their operations.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT.

Prior to May 1965, the Cadillac Division of General Motors Corporation ("GM"), which manufactures Cadillac automobiles, parts and accessories, operated two retail branches in Los Angeles for the sale and servicing of its cars and accessories—one at West Seventh Street (Bixel), and the other at Wilshire Boulevard (Wilshire). In August 1957, petitioner International Association of Machinists, District Lodge 94, AFL–CIO ("Machinists Union") was certified as the bargaining representative for a single unit of the service employees, including painters, at both the Bixel and Wilshire outlets. A contract was negotiated covering both locations. In November 1958, petitioner Automotive, Marine, Production Finishers, Equipment Maintenance & Public Service Painters, Local 1798, Brotherhood of Painters, Decorators &

Paperhangers of America, AFL–CIO ("Painters Union") was certified as the bargaining representative for a single unit of auto body painters at both locations. Thereafter, the Painters and Machinists Unions bargained jointly with GM for a single contract covering both units. Such a contract was executed on December 1, 1964, and was to remain in effect until December 1, 1967 (Pet. App. 17).[1]

Early in 1965,[2] GM decided to withdraw from the retail sale and service of Cadillac cars in Los Angeles and to transfer such operations to independent franchised dealers; it informed the Machinists and Painters Unions of its intention and subsequently bargained with them on this matter (Pet. App. 18, 21). On April 28, the parties reached a supplemental agreement to cushion the effects of the closing on the GM employees (Pet. App. 21–22). On May 10, GM wrote the Unions that, on June 1, Thomas Cadillac, Inc., would take over the Bixel location, and Lou Ehlers Cadillac would take over the Wilshire location (Pet. App. 18). About a week later, the Unions requested Thomas and Ehlers to meet with them to

[1] The agreement provided for common wages, fringe benefits, and grievance procedures at both locations. Common seniority lists were maintained by occupation, and there was no loss of seniority in transfers between occupations under certain circumstances. Seniority was applicable to layoff procedures at both locations, and an employee continued to accure seniority while employed in any GM plant on national defense work. Holiday, vacation, and paid absence eligibility computations were based on employment in any GM plant. The contract also included GM's National Pension Plan, Insurance Program, and Income Security Plan (Pet. App. 17–18, 22–23).

[2] All dates hereafter are in 1965.

"clarify the rights of the employees" of GM (*ibid.*). Ehlers informed the Unions that the request was premature (Pet. App. 18, 32), while Thomas did not respond (Pet. App. 32). The Unions' request to arbitrate the issue under the GM contract was also declined (Pet. App. 31–32).

On May 28, GM discharged all employees at its Bixel and Wilshire locations. Approximately 117 employees had been in the contract unit—75 at Bixel and 42 at Wilshire. All were union members, except for 2 mechanics and 1 painter at Bixel and 1 mechanic at Wilshire (Pet. App. 18).

On June 1, Thomas and Ehlers commenced operations as independent, competing franchised dealers. In staffing their businesses, both employers considered former GM employees, as well as others; all persons interested were required to submit applications for employment, and employees were hired solely on the basis of ability. Of the 63 service department employees hired by Thomas, only 16 were former GM employees. Its service department supervisory staff of 7 included only 3 former GM service department supervisors. Of the 35 service department employees hired by Ehlers, only 11 were former GM employees. Ehlers' management consisted of Lou Ehlers as general manager, a business manager and general sales manager who had been with Ehlers' prior dealership, and the former GM-Wilshire manager who became Ehlers' new car sales manager. The manager and foreman of Ehlers' service department were not the same individuals who had held those positions for GM (Pet. App. 18–19).

B. THE DECISIONS BELOW

Based on charges filed by the Unions, the General Counsel of the Board issued a complaint alleging that Thomas and Ehlers were the successors to GM and that they therefore violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions (J.A. 340–357).[3] The Board concluded, however, that "Thomas and Ehlers did not take over or succeed to GM's bargaining unit" (Pet. App. 19), and accordingly dismissed the complaint. The Board noted that "neither [Ehlers nor Thomas] employed a significant number of service employees who had worked for GM, and the supervisory hierarchy bears little resemblance to that formerly existing under GM. Moreover, * * * both Thomas and Ehlers selected their employees * * * on the basis of skill and ability, and were in no way influenced by union membership of the job applicant" (*ibid.*).

The court of appeals upheld the Board's dismissal of the complaint. The court stated, *inter alia*: "Even a cursory comparison of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, * * * whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers. * * * [M]anagement,

[3] "J.A." refers to the appendix to the briefs in the court below, a copy of which has been filed with the Clerk.

accounting, and advertising were centrally controlled under the factory arrangement but were totally separate and independent after the new franchise dealers took over" (Pet. App. 5). The court concluded: "Our review satisfies us that the record contains substantial evidence which supports the Board's finding that Thomas and Ehlers were not successors of the General Motors' dealerships, thereby neutralizing the contention that the prior existence of a valid certification created a presumption of continued majority status which obligated Thomas and Ehlers to bargain with the Unions" (Pet. App. 7).[4]

ARGUMENT

Petitioners do not seriously contest (Pet. 22) the Board's finding, upheld by the court below, that Thomas and Ehlers were not "successor employers" to GM.[5] Rather, petitioners seek to present (Pet.

[4] In a concurring opinion, Judge Leventhal suggested that, although a purchaser ultimately may be found not to be a "full successorship," "[w]here there is a continuity of business purpose there may be a preliminary and partial bargaining relationship during the transition period" which would obligate the purchaser to discuss the retention of existing unit employees with their union representative (Pet. App. 11–12). Judge Leventhal concluded, however, that this narrower issue was not presented in the instant case (Pet. App. 13).

[5] Where a transfer of assets and employees from one employer to another leaves intact the identity of the employing enterprise, the former's duty to recognize and bargain with an incumbent union devolves upon the latter as a "successor employer." *Makela Welding, Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1, 4 (C.A. 5); *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765 (C.A. 4), certiorari denied, 389 U.S.

18–20) the issue suggested in Judge Leventhal's concurring opinion (n. 4, *supra*), *i.e.*, even if Thomas and Ehlers were not true successors, there should be imposed upon them *"the limited duty of responding affirmatively to the Union's request to subject the important issues of retention of employment to the collective bargaining process"* (Pet. 22; emphasis in original). But, as Judge Leventhal correctly pointed out (Pet. App. 13), the complaint did not allege any such limited obligation (see J.A. 349–356). Nor, contrary to petitioners' assertion (Pet. 20–21), was the issue litigated at the Board hearing. Although petitioners requested Ehlers and Thomas to discuss the effect of their acquisitions on the unit employees, the theory on which it was contended that they were required to do so was that they had succeeded to GM's bargaining obligations. There was no discussion of any obligation Thomas and Ehlers might owe to the GM employees independent of successorship.[6] The issue which petitioners seek to raise is, therefore, not presented in this case.

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838. However, where, as here, substantial changes, not for the purpose of avoiding the bargaining obligation, are made in the operation, structure, or work force of the enterprise, altering its former identity, the new employer is not a "successor." Compare *National Labor Relations Board* v. *John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833, 835–836 (C.A. 9), with *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board*, 377 F. 2d 463, 466 (C.A. 9), certiorari denied, 389 U.S. 841. See *National Labor Relations Board* v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (C.A. 5).

[6] Petitioners' reliance (Pet. 19) on *Chemrock Corp.*, 151 NLRB 1074, is misplaced. The Trial Examiner relied on *Chemrock* for the proposition that, assuming successorship is established, the successor employer may not terminate the previous owner's employees and then claim a good faith doubt of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the union's majority status (see Pet. App. 56). However, the Examiner's finding of successorship was reversed by the Board. *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board, supra* (Pet. 18–19), is similarly inapposite. There an employer deemed to be a successor attempted to avoid that status by requiring his predecessor to discharge the entire work force prior to acquisition. Here, on the other hand, Thomas and Ehlers hired their work forces on the basis of merit, without any intention of evading a bargaining obligation (Pet. App. 5, 19).

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INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondents,

LOU EHLERS CADILLAC and THOMAS CADILLAC, INC.,

Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF INTERVENOR LOU EHLERS CADILLAC IN OPPOSITION.

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Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF INTERVENOR LOU EHLERS CADILLAC IN OPPOSITION.

STATEMENT OF THE CASE.

In the proceeding below, the General Counsel and the Unions contended that Ehlers was a successor to GM. Under the doctrine of successorship, if the purchaser of a business operates the same business as that of the seller without significant change, including employee complement, he is regarded as a successor. The exclusive bargaining agent of the seller's employees is generally presumed under such circumstances to also be

the exclusive bargaining agent of the successor's employees. This presumption is grounded upon the reasonable assumption that where the only significant change is that of a different employer, the employee desires as to union representation would continue when they became employees of the new employer.

This presumption, however, is rebuttable. If rebutted, or if there are circumstances which justify the successor's good faith doubt that his employees desired representation by the union, then the union must demonstrate support by the majority of the successor's employees in the appropriate bargaining unit before the successor has any duty to bargain with it.

The Board found, and the Court of Appeals concurred, that Ehlers was not a successor to GM. In view of this finding the Board did not consider Ehlers' other defenses, based on the assumption there was a successorship, the principal ones being: (1) Under the circumstances here present, including the fact that the GM unit was a multiplant unit whereas Ehlers only operated at Wilshire, no presumption ever arose that the Unions were the exclusive bargaining agent of Ehlers' employees; (2) Assuming such a presumption did arise, it was effectively rebutted by many circumstances, including the fact that a majority of GM's shop employees at Wilshire had voted against representation by the Machinists; (3) The alleged bargaining units were inappropriate, praticularly by failure to include all the shop employees in a single unit and by claiming the painters were a proper separate unit.

In view of the finding that there was no successorship, and in the absence of any evidence that a majority of Ehlers' employees desired representation by the

Unions, the Board necessarily concluded that the Unions were not the exclusive bargaining agent of Ehlers' employees. Accordingly, Ehlers had no duty to bargain with the Unions, so Ehlers did not violate Section 8(a)(5) of the National Labor Relations Act [29 U.S.C. § 158(a)(5)] by refusing to bargain with the Unions.

Apparently the Unions have finally reluctantly accepted the fact that Ehlers was not a successor to GM. At least that is our understanding of their Petition. Hence we do not argue herein the issue of successorship, nor in our Summary of Facts have we set forth to any great extent the circumstances demonstrating there was no successorship.

The Unions now make a different claim. The Unions no longer assert that they are, or were, the exclusive bargaining agent of Ehlers' employees. Instead, the Unions have advanced a new and novel contention that, briefly, Ehlers had a limited duty to bargain with them relative to the possible hiring of GM employees and it refused to so bargain.

A more accurate version of the Union's statement of the new "Question Presented" (Pet. 2) would be as follows:

> Whether Section 8(a)(5) imposes the duty upon the prospective purchaser of some of the assets of one branch of a business prior to the time it begins operations to negotiate with the certified bargaining agent of the prospective seller's employees in a multibranch unit as to the hiring of all or some of the prospective seller's employees?

The contention of the Unions, as we discuss hereinafter, could only be sustained by a change in the law.

SUMMARY OF FACTS AND PROCEEDINGS.

Throughout this brief we will refer to Petitioner International Association of Machinists, District Lodge 94 as the "Machinists" or "Union" and Petitioner Automotive, Marine, Production Finishers, Equipment, Maintenance and Public Service Painters Local Union 1798 as the "Painters", and jointly as the "Unions". The Petition for Writ of Certiorari will be cited merely as "Pet." and the Appendix thereto as "Pet. App.". The Intervenor Lou Ehlers Cadillac will be referred to herein as "Ehlers". The printed Joint Appendix of the parties before the Court of Appeals will be cited as "Jt. App.". The transcript of the record of the hearings before the National Labor Relations Board (hereafter "NLRB") will be cited as "Tr." Exhibits before the Labor Board that have not been printed in the Joint Appendix will be referred to as "G.C. Exh.", or "R.E. Exh.", for exhibits of the General Counsel or of Ehlers, respectively.

The facts were not in dispute, so there was no conflict in the evidence and no problems of resolving credibility. Since there was no dispute on the facts, to expedite the proceeding the parties introduced the evidence in the easiest manner possible. Thus, they submitted, mostly without objection, depositions in other proceedings, affidavits, unsworn written statements, hearsay, and conclusionary statements. There were relatively few objections to any of the exhibits or testimony. No Exceptions were filed by any of the parties to the Trial Examiner's rulings on the evidence.

In its Statement of the "Board's Findings of Fact" [Pet. 3-12], the Unions refer to and quote from the findings by the Trial Examiner. These findings, how-

ever, to a great extent were inconsistent with the Board's findings, and in this connection the Board adopted "only those findings, conclusions, and recommendations of the Trial Examiner consistent with this Decision and Order" (Pet. App. 15).

In our argument we will refer back to the following summary of the facts by paragraph number.

A. General Motors.

1. General Motors (hereinafter "GM") is the world's largest private corporation, with a number of auto plants and other facilities in the Los Angeles area [Jt. App. 936, 972, 312-313; R.E. Exhs. 7, 8]. In 1949, GM, through its Cadillac Motor Car Division, opened in the central business district of Los Angeles on Seventh Street at the corner of Bixel (hereinafter "Bixel") a branch retail sales outlet for the sale of Cadillac cars, parts, and accessories and the servicing of such vehicles [Jt. App. 214-215]. In 1954, GM opened a sub-branch of its Cadillac Los Angeles retail branch on Wilshire Boulevard (hereinafter "Wilshire") [Jt. App. 214-215]. In addition, GM also operated, as a part of its Cadillac Los Angeles sales branch, a used car lot on Vermont (hereinafter "Vermont") [Jt. App. 206-207].

2. The Wilshire operation was not self-sufficient, but was integrated with the Los Angeles retail branch operations at Bixel and Vermont [Jt. App. 206-221, 225-233, 297-300, 309, 311, 316, 438-439, 577, 580, 940-941, 1123]. It was but a sub-branch of the main Bixel location which was the primary operation of the Los Angeles retail branch [Jt. App. 299]. The branch manager, controller, used car manager, personnel manager, credit manager, and other management personnel

were located at Bixel [Jt. App. 206, 209-211, 216]. The accounting, personnel, and other functions were centralized at Bixel for all three locations, and the Bixel shop was the dominant shop [Jt. App. 206-207, 212-213, 216, 226]. The Los Angeles retail branch, moreover, was subject to direction and control from Detroit [Jt. App. 209, 217-219]. This was particularly true in the critical area of labor relations [Jt. App. 636, 937, 941, 948, 951, 952, 970-974, 989-991, 1075, 1123-1124]. A number of the Los Angeles retail branch managers and executives were in fact on a GM Detroit payroll [Jt. App. 213].

3. Cadillac retail sales in the Los Angeles area were made primarily through some 14 independent franchised dealers [Jt. App. 1118]. GM as a manufacturer did not depend on a retailer's profit and did not seek through its Los Angeles branch to compete with such franchised dealers either in the sale or service of Cadillacs [Jt. App. 219, 960].

4. Following a secret ballot election, on August 1, 1957, the NLRB certified the Machinists as collective bargaining agent of the mechanics, painters, and certain other shop employees of GM at both its Wilshire and Bixel locations in a single multi-plant unit [Jt. App. 1099-1100, 1104-1105]. In the NLRB election which preceded the certification, the Wilshire employees voted almost two to one against representation by the Machinists. However, the vote at the larger Bixel shop was two to one in favor of the Machinists with the consequence that the combined tally resulted in a majority vote for the Machinists [Jt. App. 1101-1105, 1135-1136]. This was the only opportunity the GM

employees at Wilshire ever had to express their desires relative to representation by the Machinists.[1]

5. On October 17, 1957, GM and the Machinists entered into a contract covering both the Wilshire and Bixel shops as a single unit [Jt. App. 945-947; G.C. Exhs. 19-C, 19-D].

6. On November 6, 1958, the Painters was certified by the NLRB as representative of the painters employed by GM at its Wilshire and Bixel shops in a multi-plant unit [Jt. App. 1107-1113].

7. GM then entered into a contract with the Machinists and Painters in a single unit on December 4, 1958 and renewal contracts on October 22, 1961 and December 1, 1964 [Jt. App. 948-956]. The 1964 contract, which by its terms was to be effective to December 1, 1967, consisted of eight documents totaling 276 pages [Jt. App. 577-639; G.C. Exhs. 6-D, 6-E, 6-F, 6-K, 6-L, 6-M]. This contract, as did each of the

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[1]Theoretically, the employees at Wilshire could have filed a decertification petition near the termination of the union contract in 1951 and 1954. But this practically could not be expected. So long as the larger majority of the employees at Bixel desired Machinists representation, the Wilshire employees could not achieve decertification. This is so since a decertification election would have to be held in the multiplant unit, including Bixel. *Pet Dairy Products Co.*, 118 NLRB 1562 (1957); *cf. General Motors Corp.*, 120 NLRB 1215 (1958).

Further, since the employees at Wilshire were required by the contract to be members of the Union, it would take an unusually brave and daring employee to undertake a decertification move against the very Union of which he was a member. Union pressures and intimidation against such an employee are commonplace. Further, the employee would make himself subject to union penalties. *Price v. NLRB*, 373 F. 2d 443 (9th Cir. 1967); *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965); *cf. NLRB v. Allis-Chalmers Mfg Co.*, 338 U.S. 175 (1967). Finally the employee would run the risk of being discharged by his employer for such action. See *Midtown Service Co.*, 171 NLRB No. 161, 69 LRRM 1057 (1968).

prior contracts, contained a union shop clause [Jt. App. 315-316, 589; G.C. Exh. 19-C]. Thereunder, seniority was based on combined length of service at both Bixel and Wilshire [Jt. App. 599, 602]. The agreement was patterned to some extent upon GM's national agreement with the United Automobile Workers [Jt. App. 1013-1018, 1022], and in some situations seniority accrued while working at other GM facilities [Jt. App. 607]. The holiday pay, vacation pay, and paid absence benefits and eligibility were based on length of employment in any GM facility [Jt. App. 612-613, 620, 623, 624]. The contract included the GM national hourly pension plan, insurance program, and income security plan, under which eligibility and benefits were based on length of service with GM anywhere [G.C. Exhs. 6-D, 6-E, 6-F, 6-K, 6-L, 6-M].

8. GM determined early in 1965 to discontinue operation of its own retail Cadillac stores in California. Through Pais, the Assistant Personnel Director of Cadillac in Detroit [Jt. App. 934], GM had meetings with the Unions on January 12, 1965 and April 12, 1965 concerning the anticipated closing of its Los Angeles Cadillac retail branch, and wrote the Unions on January 21, 1965 and March 26, 1965 concerning meetings "to discuss and explore the possible effects and any problems that might be associated with such change" [Jt. App. 958-969, 1075-1079]. On April 14, 1965 Pais met with the Unions' officials and shop committee to further discuss the situation [Jt. App. 969-973]. This resulted in a written agreement, the Supplemental Agreement of April 28, 1965, which provided (in anticipation of the closing of the retail branch) that employees (to take another job) could take a voluntary

layoff out of line of seniority [Jt. App. 973-974, 1082-1083].

9. On May 10th, Pais informed the Unions orally and by letter of the names of independent dealers who would operate at Wilshire and Bixel after GM went out of the retail business [Jt. App. 966-967, 1081]. In any of such meetings, or otherwise, GM did not refuse to consider any proposals the Unions cared to make concerning their members, but the Unions did not at any time oppose GM's planned termination of its employees nor did they request that GM require the new dealers to hire GM's unit employees [Jt. App. 961, 973, 997-998, 1005-1006; R.E. Exh. 15].

10. On April 14, 1965, GM informed all its Los Angeles Cadillac retail branch employees that it was discontinuing that branch's operations as of May 28th [Jt. App. 974-975]. GM did cease all operations at its Los Angeles branch at the end of Friday, May 28, 1965, and all of its employees (except those who went to work for some other GM facility) were terminated by GM as of that date [Jt. App. 143, 145, 153-154, 161].

11. The GM employees were given their vacations and absence pay, prorated to the end of May [Jt. App. 1126-1127]. Most also elected to receive immediately their accumulations (paid by GM in amounts up to $1380) under the GM Income Security Plan, including 31 out of the 42 unit employees at Wilshire [Jt. App. 1127, 1130]. Such amounts were payable under the Plan in a lump sum only on final termination [G.C. Exhs. 6-F, 6-M]. Many employees, having reached the permissible retirement age and having the necessary minimum 10 years of service, were retired

under the GM pension plan, including 11 in the unit at Wilshire [Jt. App. 300-301, 999, 1127, 1129]. Pensions were allowed those between the ages of 55-60, though the minimum age for voluntary retirement under the hourly plan was 60 [Jt. App. 301, 999].

B. Ehlers.

12. Lou Ehlers had operated Buick dealerships in Milwaukee and Madison, Wisconsin for a number of years, which he was required to dispose of—and did as of May 15, 1965—as a condition of acquiring a Cadillac franchise in Los Angeles [Jt. App. 172-173, 428]. He believes, and practices, that a good automotive repair service is the prime source for obtaining new car customers. Hence, he has been a bear regarding quality workmanship, and was commended by Buick a number of times for the excellent service record at his Wisconsin dealerships [Jt. App. 173-174, 1116]. Lou Ehlers had a union in his Madison Buick shop, the United Auto Workers, for almost six years until he disposed of the agency [Jt. App. 199, 319]. Lou Ehlers is not opposed to collective bargaining, as witnessed by the excellent relations he had there with the UAW without any trouble of any kind [Jt. App. 199].

13. In his first discussion in Detroit in March 1965 about possibly obtaining a Cadillac dealership in Los Angeles, Lou Ehlers was advised that GM had a union agreement in its Los Angeles shop [Jt. App. 164, 168-169, 431]. At the same time, however, he was told that the contract would not be binding on him [Jt. App. 202, 431]. He was also subsequently so advised by his counsel [Jt. App. 202-203]. Lou Ehlers did not request GM to discharge its Wilshire employees [Jt. App. 161, 431, 995]

14. Ehlers is a small California family corporation, organized May 19, 1965, owned primarily by Lou Ehlers and his wife [Jt. App. 161, 180, 427].

15. Lou Ehlers entered into a buy and sell agreement with GM's Cadillac Division on May 12, 1965 to purchase, primarily, the fixed assets of GM at Wilshire after the end of May, 1965 and to sublease from GM the Wilshire premises [Jt. App. 432-433, 519-537]. Under the agreement, consummation of the transaction was conditional upon GM subsequently issuing a franchise to Ehlers [Jt. App. 441, 528]. Lou Ehlers then assigned this agreement to Ehlers on June 1, 1965 [Jt. App. 571]. The transaction was consummated as of that date by GM's bill of sale and an assignment, which were executed on June 7, 1965 [Jt. App. 537-553]. Also on June 1, 1965 GM issued a Cadillac dealer's franchise to Ehlers [Jt. App. 140-141, 649-714].

16. Ehlers' sublease from GM of its Wilshire premises did not cover the entire term under GM's lease with its lessor [Jt. App. 167-168, 440, 529]. Ehlers' sublease covered but 28 percent of the premises used by GM in its Los Angeles Cadillac retail branch operation [Jt. App. 190, 221-222, 313-314, 1120].

17. Ehlers' purchases from GM, all for cash, covered a number of the physical assets located at Wilshire, including furniture, fixtures, machinery, shop equipment, service cars, and special tools (capital items) for a price of $28,000, and miscellaneous inventory items for $20,139, the total being $48,139 [Jt. App. 1115]. The foregoing does not include the new Cadillacs and Cadillac parts and accessories acquired, which any dealer must acquire and therefore has no significance [Jt.

App. 163, 166, 183, 538], or the less than one week's acquisition of used cars [Jt. App. 166, 1127].

18. Because of the unsatisfactory condition of the Wilshire premises, Ehlers immediately undertook a major renovation program at a cost of $75,000 [Jt. App. 1641]. In addition, Ehlers had to immediately expend for additional equipment, furniture, non-factory inventory items, etc., the sum of $71,200 [Jt. App. 164-166]. These additional purchases and expenditures by Ehlers, totaling $146,200, were more than three times greater than its $48,139 in similar purchases from GM. Thus, Ehlers' purchases from GM constituted less than one-third of its immediate requirements. Ehlers' purchases from GM did not include any of the assets of GM used by it at Bixel or in connection with its Vermont used car lot [Jt. App. 169]. Hence, Ehlers acquired physical premises (by sublease) and assets amounting to less than one-third of those used by GM in its Los Angeles retail operation and the assets purchased from GM amounted to less than one-third of Ehlers' needs.

19. Ehlers did not purchase from GM any of its real property, non-trade accounts receivable, goodwill, customer lists, permits, licenses, trademarks, files, records, etc. [Jt. App. 147-150, 163, 499, 1127]. Ehlers did not acquire any of the monetary liabilities of GM's Los Angeles retail branch, amounting to many thousands of dollars [Jt. App. 1127-1129], nor did it assume any of the other obligations of GM, including its Union contract [Jt. App. 148, 168, 499].

20. Lou Ehlers was at the Wilshire location for a few weeks in May [Tr. 245]. He discovered that the GM operation was a most unsatisfactory and inefficient one, and that this was particularly true with reference

to the service shop. He heard numerous complaints from GM customers, service advisers, and salesmen that the shop service was very poor [Jt. App. 503, 508, 511-513]. He determined that his shop operation would have to be drastically improved from that of GM's and, accordingly, that he could not hire the GM work force intact [Jt. App. 170]. Following his policies in Wisconsin, he concluded he would put in effect the most favorable wages and salaries, and other conditions of employment, and recruit only the most qualified people, including the shop employees with the most diversified skills [Jt. App. 173, 189, 199, 479-480, 806].

21. Lou Ehlers was not personally qualified to determine the competency of GM's shop employees, so he asked the GM Service Manager, Baesemann, and a GM Wilshire foreman, Graham, each of whom had been highly recommended to him, to select the most competent and satisfactory of GM's unit employees without any limit as to the number they could recommend [Jt. App. 171, 194-195, 408, 806]. They, each acting independently, recommended to Ehlers the hiring of the same eleven GM employees as meeting Ehlers' requirements for versatility, experience, and workmanship [Jt. App. 175, 413-414, 479-481, 806], and all these eleven were so hired on May 28th [Jt. App. 407, 806].

22. Additional shop employees were hired by Ehlers during the same week from various sources [Jt. App. 163, 170, 490-491, 807]. All of the mechanics hired by Ehlers had received training at a GM school [Jt. App. 408, 409]. As found by the Board [Jt. App. 58-59] and the State court [Jt. App. 125], Ehlers selected its shop employees on the basis of skill and ability, without being influenced by union membership [Jt. App. 806].

Out of necessity, because of lack of time, Ehlers was compelled to hire most of its remaining staff from the former GM Wilshire employees on a probationary basis until it could determine which ones were qualified to be retained [Jt. App. 171-172, 193-194].

23. Ehlers commenced business on Tuesday, June 1, 1965 [Jt. App. 138, 161].[2] It purchased new Cadillacs from GM and sold the same at retail, operated a repair shop, and also undertook the leasing of Cadillacs, in competition with 15 other franchised Cadillac dealers in the area [Jt. App. 160, 178-180, 183, 1117]. Ehlers is a separate business distinct from GM. Thus, it had its own licenses, deposits, bonds, etc. [Jt. App. 174-175, 317-318]. Ehlers did not take over any of the contracts GM had with vendors of materials or service [Jt. App. 314-315]. Ehlers' vendors of services and materials are different from those used by GM [Jt. App. 186-188, 227, 318-319, 1126]. Ehlers maintains relations with banks, accountants, doctors, attorneys, insurance consultants, etc., different from those used by GM [Jt. App. 186, 204, 1125-1126].

24. Ehlers was required to pay a sales tax on the capital items purchased from GM because the transfer was not between related parties [Jt. App. 1115]. Ehlers was not allowed to take advantage of GM's lower unemployment insurance tax rate which it enjoyed because of its favorable experience [Jt. App. 175-176, 1126]. Payroll taxes paid by Ehlers or withheld from employee wages were computed (relative to the maximum annual taxable wage) without regard to prior earnings with GM [Jt. App. 176-177]. Ehlers' work-

[2]Ehlers finished the repairs on three cars left in the shop by GM [Jt. App. 311].

men's compensation insurance rate was not based on GM's experience but on Lou Ehlers' Milwaukee experience [Jt. App. 181, 263].

25. Ehlers' management, which included Lou Ehlers and two top managers who were with Ehlers in Milwaukee, was completely different from that of GM [Jt. App. 182, 317, 423-424, 449, 573]. Similarly Ehlers' supervisors of shop employees were substantially different from those of GM [Jt. App. 451, 573, 714-715]. In June of 1965, Ehlers had 87 employees, compared to 279 employed by GM in its Los Angeles branch. Fifty-four of those had formerly been employed by GM [Jt. App. 180-181, 1119, 1121]. Ehlers then had 35 shop "unit" employees, compared to 117 in GM's unit. Eleven of these had formerly been employed by GM [Jt. App. 1119, 1121]. These 11 constituted about 10 percent of the GM unit employees, about 25 percent of the 42 GM unit employees at Wilshire, and 31 percent of Ehlers' unit employees. By November of 1965, Ehlers had 93 employees, only 36 of whom had formerly been employed by GM, including 9 (or 23 percent) in Ehlers' unit of 40 [Jt. App. 1119].

26. Ehlers established its own salaries, wages, hours, and terms and conditions of employment which were different from and unrelated to those of GM and which were better than those found in most local automotive shops [Jt. App. 186-189, 198-199, 301-302, 400, 404, 406-407, 467, 478-479, 482, 485-490, 565-570, 608-633; G.C. Exh. 6-L].

27. Many of Ehlers' operation practices and procedures, involving also those in the shop, were significantly different from those of GM [Jt. App. 296-297, 301-302, 310-311, 395-397, 401-402, 414-416, 469-474,

479-485, 489], including substantial differences in the composition of the alleged bargaining unit [Jt. App. 145, 184, 296, 319-320, 398-399, 372, 403, 473, 1126].

28. Ehlers' only business is that of operating the dealership at Wilshire [Jt. App. 160, 183]. It has no connection with GM other than that of a sublessee of certain premises and that of a distributor of Cadillac products [Jt. App. 162]. The dealer's franchise issued to Ehlers was nonexclusive and in GM's standard form [Jt. App. 140-142, 649-714]. Thus, any control GM allegedly had over Ehlers [Pet. 8-9, 22] was no different than that GM had over its numerous other Cadillac dealers. Ehlers has no connection with Intervenor Thomas Cadillac, Inc. (hereafter "Thomas"); it is merely a competitor of Thomas, and its purchases and arrangements with GM were made completely independently of Thomas [Jt. App. 161-162, 224-225, 301, 425-434].

C. Ehlers' Relations With the Unions.

29. By letter of May 19, 1965 to Ehlers, received May 22, 1965, the Unions referred to their existing contract with GM and suggested to Lou Ehlers that he meet with them "to clarify the rights of the employees" of GM [Jt. App. 139, 642]. Before the letter was received, on May 20, 1965, the Union's counsel, Ansell, called Ehlers' counsel, Lund, regarding a meeting to discuss application of the GM union contract to Ehlers and possible recognition by Ehlers of the Unions as bargaining representatives. He was in turn advised that Ehlers did not and would not consider itself bound by GM's contract, that any question of recognition was

premature, and so that a meeting did not appear to be necessary at that time [Jt. App. 1131-1132]. There was another similar conversation on May 25th and one with the Painters' counsel, Geffner, on May 27th in which, in answer to an inquiry as to what the situation was as to the GM shop men to be hired, Lund advised that as of the moment it was uncertain which of the GM men would be hired [Jt. App. 1132-1133]. Then by letters of June 3rd and 8th, the Unions requested Ehlers to agree to submit to arbitration the alleged issue of whether the GM contract was binding on Ehlers, which requests were refused by Ehlers by letters of June 7th and 14th [Jt. App. 139, 643-648].

30. On June 9, 1965, the Unions began picketing Ehlers and continued such picketing until after the decision of the Labor Board herein [Jt. App. 156-157]. However, notwithstanding such picket lines, all the employees of Ehlers, including those who formerly worked for GM, continued at work [Jt. App. 156-157, 198, 319].

31. Ehlers had intended to file a representation petition with the Labor Board when and if the Unions claimed that a majority of Ehlers' employees desired union representation [Jt. App. 1134-1135].[3] The Unions, however, by the precipitous filing of unfair labor practice charges, prevented such an effective course because under Labor Board rules the pendency of such charges precludes the processing of an employer pe-

[3]An employer representation petition filed prior to a representation demand [*Raymond F. Schweitzer, Inc.*, 165 NLRB No. 84, 65 LRRM 1367 (1967); *Maclobe Lumber Co.*, 120 NLRB 320 (1958)] or prior to the hiring of a representative number of employees [*Cramet Inc.*, 112 NLRB 975 (1955); *cf. General Extrusion Co.*, 121 NLRB 1165 (1958)] would be dismissed.

tition.[4] Thus, Ehlers did not file such a petition because it "would have been futile" to do so [Jt. App. 1134-1135].[5]

32. On June 28, 1965, the Unions filed in the Los Angeles, California Superior Court an action against Ehlers to compel it to arbitrate several alleged issues under the GM union agreement, including a demand that it hire all of the GM shop employees [Jt. App. 98, 104-114]. On substantially the same record as that before the Labor Board [Jt. App. 99-100], the California Court on June 30, 1966 held that Ehlers was not a successor to GM and that the GM union contract was not binding on Ehlers and dismissed the suit [Jt. App. 121-129]. *Cooksey v. Lou Ehlers Cadillac*, 63 LRRM 2425.

D. Proceedings Below.

33. On June 3, 1965, the Painters, and on June 4, 1965, the Machinists filed unfair labor practice charges against Ehlers with the Labor Board, asserting that Ehlers had violated Section 8(a)(3) of the Act by refusing to hire GM employees and had violated Section 8(a)(5) by refusing to bargain with them [Jt. App. 327-329, 335-337]. The General Counsel found no merit in the Section 8(a)(3) charges and they were not included in the amended charges upon which the complaint was issued [Jt. App. 329-331, 337-339].

34. The General Counsel issued a Consolidated Complaint against Ehlers and Thomas [Jt. App. 339-357].

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[4]"The Board's policy of not conducting a representation election while unfair labor practice charges are pending has long met with court approval." *Furr's Inc. v. NLRB*, 381 F. 2d 562, 570 (10th Cir. 1967) *cert. den.* 389 U.S. 840 (1967).

[5]*Gulfmont Hotel Co.*, 147 NLRB 997, 1002 (1964) *enf'd* 362 F. 2d 588 (5th Cir. 1966).

The complaint alleged that Ehlers had been since June 1, 1965 the successor to Cadillac at Wilshire [Jt. App. 344-345], that since June 1, 1965 the Machinists had represented a majority of Ehlers' employees in a unit of, roughly, its shop employees and the Painters had similarly represented Ehlers' painters [Jt. App. 349, 352], and that Ehlers had refused to bargain with the Unions as the representatives of its employees [Jt. App. 350, 353] in violation of Section 8(a)(5). The complaint also alleged that Ehlers violated Section 8(a)(5) by refusing to honor or give effect to the contract between GM and the Unions [Jt. App. 351, 354].

35. Ehlers filed a motion to sever the complaint and proceedings as to it from those pertaining to Thomas [Jt. App. 379-381], which motion was denied [Jt. App. 389].

36. Following hearings, the Trial Examiner concluded that Ehlers was a successor to GM and had violated Section 8(a)(5) by refusing to bargain with the Unions and refusing to honor the GM union contract [Jt. App. 9-54; Pet. App. 24-64].

37. While the matter was pending before the Board on Ehlers' Exceptions [Jt. App. 88-97], Ehlers filed a motion with the Board to take judicial notice of the decision in the State court case [Jt. App. 97-129].

38. On March 29, 1968 the Board (by McCulloch, Chairman, Fanning, Zagoria, and Jenkins) unanimously found that Ehlers was not a successor to GM and that it had no duty to bargain with the Unions, and accordingly dismissed the complaint [Jt. App. 54-62; Pet. App. 15-23]. 170 NLRB No. 92; 67 LRRM 1504. The Unions filed a petition with the Court of Appeals for

the District of Columbia to review and set aside the order of the Board. That Court (by Burger, Tamm, and Leventhal) unanimously affirmed the Board by denying the petition (Pet. App. 1-14). .... F. 2d ...., 71 LRRM 2150 (not yet officially reported). The Unions then filed their petition to this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT.

Under Section 8(a)(5) of the NLRA an employer has only the duty to bargain with the majority representative of his employees as their exclusive bargaining agent. Contrary to the allegations, the finding below was that Ehlers was not a successor to GM and hence the Unions were not the bargaining agents of Ehlers' employees. The Unions, therefore, have changed their position and now contend only that Ehlers, as a prospective purchaser from GM, had a duty to bargain with them relative only to the hiring of GM's employees.

The Unions' present claim was not an issue before the Labor Board and has not been litigated. Until the Petition herein was filed, the entire basis of the Unions' case, under the General Counsel's complaint, was that Ehlers violated Section 8(a)(5) by refusing to bargain with them as exclusive bargaining agent of Ehlers' own employees. Thus, the Petition should be denied on this ground alone.

On the merits of the Unions' argument, there is no conflict between the decision below and that of other courts of appeal or of this Court. On the contrary, there are decisions by five courts of appeals which sustain the decision below.

Thus, there is no undecided important question of federal law before this Court.

Section 8(a)(5) of the Act expressly imposes the duty to bargain on an employer only with the majority representative of his own employees. Hence, it does not impose any duty before the employer has acquired his employees or with reference to the employees of any other employer. The interest of GM's employees in employment is protected by Section 8(a)(3) of the Act, which prohibits a purchaser (or other employer) from refusing to hire them because of their union connections. Further, the design of the Act is that their job security can best be achieved by negotiations between their employer (GM) and the Unions. Such negotiations could even result in an agreement that the facility would not be sold or that the agreement of sale require the purchaser to hire the employees. But the Act would have to be amended to require the purchaser to bargain, even on a limited basis, with a union that is the majority representative of the seller's employees but not of the purchaser's employees.

Finally, there was not here the continuity of business purpose which, according to the Unions, is what creates the duty of the purchaser. The business purpose of a manufacturer, such as GM, was basically dissimilar from that of a small, independent dealer, such as Ehlers.

Accordingly, the petition should be denied.

REASONS FOR DENYING THE PETITION.

We submit there is no merit to the petition herein and the same should be denied on each of the grounds hereinafter stated. The length of our discussion, which is only necessary because of the complexities of the NLRA, should not mislead the Court into assuming there is any substance to the Unions' argument.

I.

THE QUESTION POSED BY THE PETITION IS NOT, AND HAS NOT BEEN, AN ISSUE IN THIS CASE.

Assuming that there is merit to the Unions' contention that a purchaser may in some circumstances have a duty to bargain with the union representing the sellers' employees relative to possible hiring of the seller's employees, such a contention was not raised, and was not an issue, in this case. There was no breach of any such duty alleged in the General Counsel's complaint. The complaint alleged [¶ 34] that Ehlers had been since June 1, 1965 the successor to GM's Wilshire operation, that since such date the Machinists had represented a majority of Ehlers' employees in a unit of mechanics and other shop employees, that Ehlers had refused to bargain with the Machinists "as the exclusive collective-bargaining representative of its employees in the appropriate unit described" with reference to wages hours, etc., and that Ehlers, by such refusal, violated Section 8(a)(5) of the Act [Jt. App. 344, 349, 350]. There were similar allegations concerning the Painters with reference to the painters employed by Ehlers [Jt. App. 352, 353].

Thus the alleged violation by Ehlers was its failure to bargain with the Machinists (and Painters) as the

exclusive bargaining agent of Ehlers' mechanics, etc. (and painters). There was absolutely no allegation of any sort that Ehlers had any obligation of any kind to bargain with reference to GM's employees.

As observed by Judge Leventhal in his concurring opinion in the Court of Appeals [Pet. App. 13]:

> "4. In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motor's employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.
>
> "This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force. . . ."

Since there was no such allegation, the hearing before the Labor Board did not involve any claim that Ehlers had any duty to bargain relative to the hiring of GM employees, so such a contention was not litigated. In their contrary assertion (Pet. 21) the Unions merely cite the record reference to the correspondence between the Unions and Ehlers. In this respect, in none of their oral or written communications did the Unions assert that Ehlers had any such duty nor did they demand or request that Ehlers bargain with them about the hiring of GM's employees [Jt. App. 642-648, 1131-1133].

As a matter of fact, the position of the Unions initially and consistently was that Ehlers was a successor

to GM, that as such such successor GM's union contract was binding on Ehlers and the Unions were the bargaining agents of Ehlers' employees, and that under the Unions' contract Ehlers was obligated to hire all GM's Wilshire unit employees. Thus, at the NLRB hearing the Unions' counsel stated, "the theory of our case initially and still is that we are the bargaining agent, because there is a successorship here" [Tr. 110]. In the State Court proceeding, the Unions sought to compel arbitration of its claim that the GM's union contract was binding on Ehlers and that, therefore, the termination of the GM employees was a breach of that contract by Ehlers and also prayed that pending arbitration Ehlers be ordered "to reinstate upon request, all employees who were terminated on May 28, 1965 to the same or substantially equivalent positions held by them prior to said date and grant them full seniority rights" [Jt. App. 113].

Thus, at no time, prior to the Petition herein, did the Unions claim that Ehlers had any duty to bargain with them other than as the exclusive bargaining agent of Ehlers' employees. The contention, now made for the first time, that Ehlers had a limited duty to bargain with the Unions as the bargaining agent of GM's employees concerning the possible hiring of GM's employees was not an issue before the Labor Board or the Court of Appeals, was not litigated, and is not, under these circumstances, properly before this Court for consideration. Hence, the Petition must be denied on this ground alone, regardless of the merit of the Unions' contention relative to the status of the law on such an issue.

II.

THE DECISIONS BELOW ARE CONSISTENT WITH ALL JUDICIAL PRECEDENT DURING THE THIRTY-FOUR YEARS OF THE ACT.

Contrary to the assertion of the Unions (Pet. 23), the decisions of the Board and the reviewing court are consistent with all precedents under the NLRA since its enactment over thirty-four years ago. In the following decisions the employer was held not to be a successor and therefore not guilty of violating Section 8(a)(5) of the Act by refusing to bargain with the union. *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959); *Piasecki Aircraft Corp. v. NLRB*, 280 F. 2d 575 (3rd Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *NLRB v. Aluminum Tubular Corp.*, 299 F. 2d 595 (2nd Cir. 1962); *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833 (9th Cir. 1964). The instant decision is consistent with each of the foregoing cases and could not have been decided any other way without having been in direct conflict with the *Alamo* and *Stepp's* cases.

The decisions of a fifth court of appeals similarly require an affirmance of the decision below. *NLRB v. Downtown Bakery Corp.*, 330 F. 2d 921 (6th Cir. 1964); *cf. NLRB v. Richard W. Kaase Co.*, 346 F. 2d 24 (6th Cir. 1965). In the *Downtown* case, involving a successorship, it was held that there was not a Section 8(a)(5) violation since majority status of the union was not established by proof only that it had been bargaining agent in a larger multi-employer unit including the predecessor employer. All the other decisions finding successorship and/or a refusal to bargain violation are clearly distinguishable. The Supreme Court has not considered any case in point.

The contention of the Unions that a purchaser of a part of the assets of a business, or of an entire business, has any duty to bargain with the union representing the seller's employees concerning the hiring of such employees is without any judicial support of any kind whatsoever. The cases relied upon by the Unions (Pet. 15-23) did not even involve a purchaser situation, with but two exceptions. In other words, each of them concerned the bargaining duty of an employer with the exclusive bargaining agent of his employees with reference to such employees. The passages quoted must be read in the light of this basic fact.

Thus, in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 204 (1964), at the outset this Court stated, "This case involves the obligation of an employer and the representative of his employees under §§ 8(a)(5), 8(d), and 9(a) of the National Labor Relations Act." . . . The Court merely held that the employer had a duty to bargain with such representative relative to its decision to terminate its own employees by subcontracting. The case of *Westinghouse Elec. Corp.,* 150 NLRB 1574 (1964) involved the same matter. *NLRB v. Royal Plating & Polishing Co.,* 350 F. 2d 191 (3rd Cir. 1965) concerned the duty of the employer to bargain relative to the termination of his own employees on closing one plant and in *Cooper Thermometer Co. v. NLRB,* 376 F. 2d 684 (2nd Cir. 1967) relative to the transfer of his own employees on relocation of the plant.

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) and *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967) involved discrimination by an employer between its strikers and nonstrikers in violation of Section 8-

(a)(3). This, in turn, was related to the definition of "employees" in the Act as including strikers. As observed in the *Fleetwood Trailer* case (p. 378):

> "Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U.S.C. §§ 157 and 163). Under §§ 8(a)(1) and (3) (29 U.S.C. § 158(1) and (3)) it is an unfair labor practice to interfere with exercise of these rights. . . ."

The case of *K. B. & J. Young's Super Markets, Inc. v. NLRB*, 377 F. 2d 463 (9th Cir. 1967) *cert. den.* 389 U.S. 841 (1967) (Pet. 18) is here inapplicable as also involving discrimination in violation of Section 8 (a)(3), although the sale of a business did take place. The purchaser there induced the seller of a chain of meat markets to discharge its employees so that the purchaser could evade and escape its obligations as a successor to recognize the union as bargaining agent and to avoid the applicablility of an existing union contract to the acquired markets. The complaint alleged, and the Board found, that the purchaser thereby had violated Section 8(a)(3) of the Act. Thus, the court, at page 465, distinguished its earlier decision in *NLRB v. John Stepp's Friendly Ford, Inc.*, 388 F. 2d 833 (9th Cir. 1964) on the ground that in this case, "pe-

titioner [Young's] caused the mass discharge of unit personnel for anti-union reasons." So, Young's was ordered to employ the discriminatees.

The facts in the instant case are entirely different [¶¶ 10, 11, 20-22]. The Unions' original unfair labor practice charges did include a claim of a violation of Section 8(a)(3) in the failure of Ehlers to hire all the GM employees [Jt. App. 328, 335-336]. But the Regional Director, after investigation, found no merit in this claim, so that the amended charges of November 17, 1965 [Jt. App. 329-330, 337-338], upon which the General Counsel's complaint of the same date was based, did not contain any such allegations [Jt. App. 340-357]. Further, GM discharged its employees without Ehlers making any request, or even a suggestion, that it do so [Jt. App. 143, 145, 153, 156, 161, 168, 431, 992, 995]. And there was no evidence contrary to the Board finding that Ehlers hired its employees on the basis of skill and ability without reference to union sympathies or connections [Jt. App. 58-59, 806].

The split decision of the Board in *Chemrock Corp.*, 151 NLRB 1074 (1964) is clearly distinguishable from the instant situation. Chemrock was indisputably a successor. It took over the operations of the seller lock, stock and barrel, including the employees and supervision, without change, and recognized the Machinists, which represented the production and maintenance employees of the seller, as bargaining agent. The Company had also planned on hiring as a group the seller's five truck drivers, represented by the Teamsters. Only when those drivers demanded that Chemrock accept their union contract and deal through their Teamster representatives did the company refuse to hire them. The de-

cision was limited solely to (p. 1080, n. 8) "circumstances such as those described above." The limited application of *Chemrock* was demonstrated by the number of Board decisions subsequent thereto wherein it was held that a purchaser did not have a duty to bargain even though it did not hire all the seller's employees.

In neither the *K. B. & J. Young's* or the *Chemrock* case was there any suggestion that a purchaser has any duty to bargain with the seller's union relative to hiring the seller's employees.

The only opinion the Unions cite which even has any bearing on their contention is the concurring opinion of Judge Leventhal in the Court below (Pet. App. 7-14). Judge Leventhal expressed his thoughts "with some diffidence" only to "help others in the delineation of their thoughts" and did not purport to express any positive views concerning a possible preliminary bargaining relationship (Pet. App. 8). This is understandable since, as the Judge draft p. 22 concluded (*supra,* page 23), the instant case did not involve such a matter and was not argued. While there was some question asked from the bench pertaining thereto at the oral argument, counsel for the intervenors were each limited to five minutes within which to make their entire argument.

In each of the cases of *NLRB v. Alamo White Truck Service, Inc.,* 273 F. 2d 238 (5th Cir. 1959), *Piasecki Aircraft Corp. v. NLRB,* 280 F. 2d 575 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961), and *NLRB v. John Stepp's Friendly Ford, Inc.,* 338 F. 2d 833 (9th Cir. 1964) it was held there was no Section 8(a)(5) violation in view of the absence of a successorship, although in each of them complaint was made about the failure of the purchaser to hire all the seller's employees.

In the *Piasecki* case, the union specifically requested the purchaser to discuss with it the hiring of the seller's employees with their seniority under its contract with the seller.

Thus, there is no authority that a purchaser of a business has any duty to bargain relative to the hiring of the seller's employees. As a matter of fact, during all the years of the National Labor Relations Act (including the Wagner Act) few, if any, purchasers have ever done so. The Unions should have been more frank in pointing out that they are urging a change in the law as it has been applied since the 1935 enactment of the Act. Consequently, the Unions' assertion (Pet. 23), as one of two reasons for granting the petition, that the decision below is "in conflict with applicable decisions of this Court and of the Second, Third, and Ninth Circuits" simply is not true.

III.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED BY THE PETITION.

One of the two grounds urged by the Unions as the reason why the Petition should be granted is the assertion that "an important question of Federal law (is) presented in this petition" (Pet. 23). We submit this is not so.

It is doubtful that the alleged question is an "important" one. Nothing was presented by the Unions to demonstrate this. Actually, while obviously important to the parties, the alleged question cannot be considered a significant one in the entire scheme of the complex NLRA.

Moreover, the present issue does not involve an undecided question (unless the Unions are asserting that

every issue under the NLRA not decided by the Supreme Court is unresolved). As demonstrated above, in our discussion of the asserted conflict among the circuits, the law in this respect has been settled for years. These prior decisions, as we shall now discuss, were clearly in accordance with the mandate of the Act.

IV.

THE ACT IMPOSES NO DUTY ON A PURCHASER TO NEGOTIATE WITH THE BARGAINING AGENT OF THE SELLER'S EMPLOYEES.

A. An Employer Need Bargain Only With the Representative of His Employees.

The Unions assert Ehlers had a duty to bargain with respect to "retention" of the work force. Despite their careful avoidance of such terminology (Pet. 18), what the Unions are claiming is that Ehlers had a duty to bargain about the GM employees it should hire. Although the Unions seek to ignore the fact, Ehlers was a distinct and different entity from GM. This was not an *alter ego* situation [¶ 28]. Ehlers was just starting in business. Hence it was necessary for Ehlers to *hire* employees for the first time. Thus, with respect to Ehlers, the individuals it hired, including former GM employees, were new employees of a different employer [¶¶ 10, 11, 21, 22, 24].

The Unions go even further and assert Ehlers had a duty to bargain with them before it was even an "employer" under the Act. Thus, the Unions insist that the date of "succession" by Ehlers was May 12, 1965 (Pet. 12), a contention that is inconsistent with the findings of the Board. That was the date Lou Ehlers entered into the buy and sell agreement with GM [¶

15]. The Unions' contention is that Ehlers thereafter became obligated to bargain with the Unions on May 20, 1965, the date the Unions first approached Ehlers [¶ 29]. But as of that date, Ehlers did not even have any employees.

In any event there could have been no "succession" until June 1, 1965. That was the date Ehlers first began its business [¶ 23], having hired its employees the few days immediately preceding [¶¶ 21, 22]. The buy and sell agreement was not effective until then. Its effectiveness was conditioned upon Ehlers qualifying for and being issued a Cadillac dealer's franchise [Jt. App. 441, 528]. And this did not happen until June 1st [Jt. App. 140-141]. And GM continued its operations through May 28th [Jt. App. 143, 145, 170]. Hence, up until June 1st Ehlers was merely a possible purchaser.

This situation in itself suggests the absurdity of the Unions' contention. According to the Unions, Ehlers had a duty to bargain with them merely because of the possibility (or probability) it would be issued a Cadillac franchise, purchase some of GM's assets, and engage in business at a location where GM had been conducting part of its Los Angeles Cadillac retail branch operations.

Section 8(a)(5) was not designed to apply to any such kind of a situation. The bargaining duty applies only to an *employer,* and then only with reference to the exclusive bargaining agent of *his* employees. *Piasecki*

Aircraft Corp. v. NLRB, 280 F. 2d 575, 589 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961).[6] Thus, Section 8(a) provides [29 U.S.C. § 158(a)]:

> "It shall be an unfair labor practice for an *employer*—* * *
>
> (5) to refuse to bargain collectively with the representatives of *his* employees, subject to the provisions of Section 9(a)" (emphasis added).

Section 9(a) provides that such representative is the exclusive bargaining agent for all such employees. It reads [29 U.S.C. § 159(a)]:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

That an employer need bargain only with the representative of his own employees is confirmed by another provision of the Act. The NLRA was amended by the Labor Management Relations Act of 1947 (the so-called Taft-Hartley Act) to impose a correlative duty to bargain upon the employees' representative. Section 8(b) provides [29 U.S.C. § 158(b)]:

> "It shall be an unfair labor practice for a labor organization or its agents—* * *

---

[6]The case of *U.S. Pipe & Foundry Co. v. NLRB*, 398 F. 2d 544 (5th Cir. 1968), cited in the concurring opinion below of Judge Leventhal (Pet. 9), did not involve the duty to bargain. In this respect it should be noted that it is only in subsection (5) of Section 8(a) that the prohibition is applicable to the employer's own employees ("his") as distinguished from employees generally.

(3) to refuse to bargain collectively with an *employer,* provided it is the representative of *his* employees, subject to the provisions of Section 9-(a)" (emphasis added).

Thus, a union likewise has the duty to bargain only with the employer of the employees it represents.

The design of the Act, then, is that a union designated by a majority of the employees in an appropriate unit is the exclusive representative of all the employees in the unit and the employer of such employees has the duty to bargain with such union and to refrain from bargaining with the employees or any other union and the union has a duty to bargain with such employer with reference to his employees.

It is true that in some situations an agreement between an employer and a union (that is not the exclusive bargaining agent) with reference to the union's members only who are employed by that employer—a so-called "members only" contract—may not be illegal. But here the Unions claim a duty to bargain with reference to its members who are not employees of Ehlers. Even assuming Ehlers could legally have bargained with the Unions relative to hiring their GM members, it would have had no duty to do so. Under Section 8-(a)(5), the only duty is that to bargain with the exclusive representative of the employer's employees. Hence, from the beginning it has been recognized under the Act there is no duty to bargain with a union (with reference to its members only, or otherwise) that is not such exclusive bargaining agent. *Mooresville Cotton Mills,* 2 NLRB 952, 955 (1937).

Prior to June 1st, the date Ehlers began operations and first had employees on its payroll, Ehlers could have

had no duty to bargain. From and after June 1st, the Unions were not the representatives of Ehlers' employees, as the Board found, which finding is not challenged by the Unions. Since the Unions were not at any time the representatives of Ehlers' employees, it at no time had any duty to bargain with them under Section 8(a)(5) of the Act.

The soundness of this analysis is demonstrated by the inadequacy of a limited duty to bargain. According to the Unions, Ehlers had a duty to bargain with them solely as to which of the GM employees it would agree to hire (Pet. 2, 18). Yet, under Section 9(a), the bargaining duty extends to "rates of pay, wages, hours of employment, or other conditions of employment." Hence, if there is a duty to bargain at all, it extends to the entire facet of the employment relationship, not just hiring.

And any bargaining about hiring alone would be meaningless. Obviously, the Unions would have to seek an agreement at the same time about the wages the GM employees would receive upon hire by Ehlers, their hours of work, and so on. The Unions would certainly press for a recognition of the length of service of such employees with GM, and unless the understanding included some prohibition on discharges any commitment about hiring could easily be frustrated. In short, there cannot be meaningful bargaining on a restricted basis, limited to the question of who would be hired. This is not the kind of bargaining envisioned by the duty imposed under the Act and it would be completely unrealistic and impractical.

In the instant case, moreover, it is difficult to understand what such limited bargaining could possibly ac-

complish. Ehlers found it necessary to hire only the most skilled and careful workmen. In selecting the employees of GM to be possibly hired, Lou Ehlers necessarily had to, and did, rely upon the judgment of GM shop supervision, the men who knew the qualifications of the employees best. And he hired everyone that they recommended [¶¶ 21, 22]. In the limited time Ehlers had available to recruit its work force, Lou Ehlers obviously could do no different, regardless of any possible protestations or representations by union officials.

Though Ehlers did not bargain with them, the Unions were not precluded from presenting to Ehlers, orally or in writing, whatever facts or information they might have thought would be persuasive to Ehlers in selecting GM employees. They did not do so because they were aware of the necessity of Ehlers relying on the judgment of GM's supervision and because, in any event, it was the Unions' position Ehlers had to hire all GM's employees before it hired anyone else.

Finally, collective bargaining under the Act is expected to be meaningful because of the availability of the strike, lockout, or other economic pressures to induce agreement. Yet, in the situation here involved the Unions could hardly put pressure on Ehlers by calling a strike of GM employees. This serves to point up how the Act was not designed to require an employer to bargain concerning some other company's employees. Thus, since the Unions were not at any time the representatives of Ehlers' employees, Ehlers had no duty to bargain with them under Section 8(a)(5) which imposes a duty to bargain only with the exclusive representative of the employer's own employees.

B. A Contract to Hire Union Members Is Prohibited by the Act.

The purpose of bargaining is to reach an agreement. Thus, the Unions are asserting that Ehlers had a duty to enter into a contract with them about the hiring of their members employed by GM. Since the Unions were not the exclusive bargaining agents of Ehlers' employees, such an agreement, we submit, would be illegal under the Act.

Pre-hire union agreements have always been held illegal under the Act. *Frick Co.*, 141 NLRB 1204 (1963). Subsection (f) was added to Section 8 of the Act by the Labor-Management Reporting and Disclosure Act of 1959, the so-called Landrum-Griffin Act [29 U.S.C. § 158(f)], to make such pre-hire agreements legal—but only in the building and construction industry! Only in such industry is such an agreement legalized, notwithstanding "the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement."

Except in building and construction, Section 8(a)(3) of the Act [29 U.S.C. § 158(a)(3)] is applicable in its entirety. Thereunder it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This provision requires that an employer remain neutral in the hiring of employees between those who may be union members or have union connections or sympathies and applicants who may not be union members or may even be anti-union.

There can be no doubt that if an employer had a duty to bargain with a union (not the representative of his employees) about hiring, this would encourage workmen to affiliate with that union. Such an agreement for preferential hiring would discriminate against non-union applicants and would encourage membership in the union. Thus, it would violate Section 8(a)(3). And this would be true even if it was not the employer's purpose or intent to so discriminate. *Radio Officers' Union of Comm. Telegraphers v. NLRB,* 347 U.S. 17 (1954).

Nor is there anything in Section 8(a)(3), or the decisions under it, which allows any distinction because the employer may be a purchaser from a unionized seller. And so, in *NLRB v. Tennsco Corp.,* 339 F. 2d 396, 398 (6th Cir. 1964), with reference to an accusation that a purchaser violated Section 8(a)(3) by failing to hire a number of the employees of a seller whose employees were represented by a union, the court commented:

> ". . . Was Tennsco obligated to hire only union members? It hired fourteen union members. Was it obligated to complete its roster with union members? This was a new corporation. It had as yet no contract with a union. Would not a compulsory all-union hiring have been an illegal closed shop?"

It is certainly inconsistent with Section 8(a)(3) to contend that a purchaser has a duty to bargain with the seller's union about hiring of the union's members and thereby give preference to such union members. Thus, the Unions' position conflicts with Section 8(a)(3) of the Act.

C. The Employment Security of a Seller's Unionized Employees Is Adequately Protected Though the Prospective Purchaser Has No Duty to Bargain.

1. Legislative Protection.

The Unions argue that employment is of prime concern to a workingman. This goes without saying. But it does not follow, as the Unions contend, that the interest in continuity of employment must be protected by a bargaining duty of a prospective purchaser.

In this respect, before the Labor Board and the Court of Appeals the Unions relied extensively on *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964). That case, however, involved Section 301(a) of the Labor-Management Relations Act of 1947 [29 U.S.C. § 185(a)] and the enforceability of an arbitration clause pursuant to the national policy favoring arbitration. Applying that decision, the State court, in the Unions' action against Ehlers, refused to order arbitration [Jt. App. 128-129]. *Cooksey v. Lou Ehlers Cadillac,* 63 LRRM 2425 (Calif. Supr. Ct., 1966).

Relative to the protection of the interests of GM employees, in *Wiley* the Court was concerned with "a duty to arbitrate previously established" and the Court cautioned, at page 551, that its opinion had no application to the duty to bargain. The inapplicability of the *dictum* at page 549 to the instant situation is demonstrated by the later case of *Textile Workers Union of America v. Darlington Mfg. Co.,* 380 U.S. 263 (1965). Notwithstanding the *dictum* in *Wiley* that the rightful prerogative of owners to "even eliminate themselves as employers" should be balanced by "some protection to

the employees from a sudden change in the employment relationship", this Court held that the NLRA did not limit an employer's absolute right to discontinue its entire business or, for nondiscriminatory reasons, a part thereof. No protection to the employees relative to their jobs was provided by the NLRA. This decision, which was under the NLRA, whereas *Wiley* was under Section 301(a) of the Taft-Hartley Act, is directly contrary to the Wiley *dictum.*

Congress has attacked the problems of unemployment by a different approach. Thus, it has prohibited discrimination in hiring and employment generally on the basis of race, sex, and age by Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-2000e-14] and by the Age Discrimination in Employment Act of 1967 [29 U.S.C. §§ 621-634]. It has provided a program of pensions and unemployment insurance. Titles II and III of Social Security Act [42 U.S.C. §§ 401-425, 501-503]. Specifically with reference to possible loss of employment as a result of a railroad merger, Congress has provided for additional protection. Section 5(2)(f) of Interstate Commerce Act [49 U.S.C. § 5(2)(f)]. It has, however, except in the railroad situation, deemed it inadvisable to make special provision for possible loss of a job arising out of the closing of a plant or sale of a facility.

2. NLRA Section 7.

While there may be a basic right to work, this is not a right protected by Section 7 of the NLRA, as the Unions contend (Pet. 17), and none of the decisions cited by them so state. There is no reference whatsoever therein to employment except to the extent it recognizes the validity of a union membership requirement.

The Section also recognizes the "right to refrain" as of equal dignity with the right to engage in the protected activities.

Also, with reference to the right to work, this is just as much a concern to the individuals Ehlers hired who had not been working for GM as it was to the GM employees. In all probability employment to the non-GM employees Ehlers did hire was of greater urgency to them than it was to the GM employees in view of the termination benefits the GM employees had, as discussed below. Thus, it cannot be said that the GM employees had greater equity in any desire to be hired by Ehlers than did the other employees Ehlers hired. It is unthinkable that it would be the policy of the law to favor the one group of workers over the other. The *Wiley* opinion makes no such suggestion, although recognizing the protection provided by contract. Yet the Unions' contention amounts basically to a claim that its members employed at GM were entitled to some preference in employment by Ehlers over other applicants.

3. NRLA Section 8(a)(3).

The interests of the GM employees in employment after termination by GM is given a measure of protection by Section 8(a)(3) of the NLRA [29 U.S.C. § 158(a)(3)] which precludes Ehlers or any employer, including a purchaser from or successor to GM, from refusing to hire any of them because of their union membership or sympathies, if any. That Section effectively prohibits an employer from refusing to hire any individual (including terminated employees of a unionized seller) because of union sympathies or membership, and the Board has been aggressive in enforcing

such provision. *K. B. & J. Young's Super Market, Inc.*, 157 NLRB 271 (1966) *enf'd* 377 F. 2d 463 (9th Cir. 1967) *cert. den.* 389 U.S. 841 (1967); *Piasecki Aircraft Corp.*, 123 NLRB 348 (1959) *enf'd* 280 F. 2d 575 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961); *T.I.L. Sportswear Corp.*, 131 NLRB 176 (1961) *enf'd* 302 F. 2d 186 (D.C. Cir. 1962).

By the same token, as discussed above, it prohibited Ehlers from favoring union members in its hiring policies.

4. NLRA Section 8(a)(5).

Assuming the validity of all the Unions' arguments about the importance of collective bargaining in protecting employees from unemployment (and this is their only argument), the Unions still have not made a case for requiring a purchaser to bargain with the seller's union. The design of Section 8(a)(5) of the Act is that protection of the workingman relative to employment and other vicissitudes will be best achieved by collective bargaining between the exclusive representative of a group of employees and their employer. This means, of course, that GM had such a duty, and not Ehlers.

Because GM had no power to hire Ehlers' employees, the Unions' argument is based upon the assumption that unless Ehlers had some duty to bargain with them relative to such hiring they have no effective means of protecting their members. The Unions' assumption, however, is erroneous.

The Unions were free over the years to negotiate with GM contract provisions to protect their members fully, assuming they had sufficient bargaining power.

Thus, they could have negotiated commitments that employees not be discharged (except for misconduct) or that they be guaranteed employment for the full term of the contract. They could have sought a provision that GM not dispose of the agency covered by the contract, or that it not do so without the Unions' approval or unless GM required any purchaser, as a condition of the sale, to hire all the GM unit employees and/or assume the union contract. Such terms are found in numerous collective bargaining agreements.[7] Thus, the Machinists had successively negotiated clauses in contracts with other employers providing [R.E. Exh. 11, Exh. "B", ¶¶ f, g]:

> "The parties agree that in the event that the ownership or management of the Company's plants or Company is changed by sale, merger, or in any other manner, this Agreement shall be included as a condition of such change or transfer."

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[7]See generally R.E. Exhs. 11 and 12. Typical union contract clauses are the following:

"If the employer shall sell, transfer, or otherwise dispose of its business . . ., the agreement by which such sale . . . is made shall provide that the person thereafter to operate the business shall assume all of the terms and conditions of this agreement and shall specifically agree to retain in his employ all members of the union then employed in the business" [R.E. Exh. 12, Exh. "B", ¶ 51,803.10].

"In the event of any change in the ownership, management or operation of the plant or facilities covered by this agreement by sale . . . or otherwise, the Company agrees that it will make it a condition of such sale . . ., and provide in the instrument effecting the same, that the purchaser . . . shall be fully bound by all the terms and conditions of this agreement. . . ." [R.E. Exh. 12, Exh. "A"].

". . . In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer . . . shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement" [1 *BNA Col. Barg. Neg. & Cont. Serv.* p. 30:3. See also *Ibid.* p. 70:182].

Such contract provisions are, of course, specifically enforceable. *Cf. International Union, United Auto etc. Workers, Local 391 v. Webster Elec. Co.*, 299 F. 2d 195 (7th Cir. 1962); *Local Division 1098, Amalgamated Ass'n, etc. v. Eastern Greyhound Lines;* 225 F. Supp. 28 (D.C. 1963); *Coulon v. Carey Cadillac Renting Co.*, 231 F. Supp. 991 (S.D.N.Y. 1962); *International Union, United Auto, etc. Workers, Local 408 v. Crescent Brass & Pin Co.*, 46 LRRM 2975 (USDC E.D. Mich. 1960) (not officially reported).

The Unions did not seek or did not succeed in achieving such contractual protection from GM for their members. However, they did obtain financial protection for their members in the event of a loss of job. This was in the form of a generous pension program, with a provision for early retirement [G.C. Exhs. 6-D, 6-K; see ¶ 11], and an income security plan (not unlike a severance pay program) which allowed cash payments on final termination of employment from GM [G.C. Exhs. 6-F, 6-M; see ¶ 11].

Moreover, faced with a GM decision during the contract term to discontinue operations at Wilshire, the Unions were again free to negotiate with GM about the effect of such action on its members. *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (3rd Cir. 1965) (Pet. 16); *NLRB v. Rapid Bindery, Inc.*, 293 F. 2d 170 (2nd Cir. 1961). As observed in the *Transmarine* case (p. 939):

> ". . . Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given an opportunity to bargain over the rights of the

> employees whose employment status will be altered by the managerial decision [citations omitted]. Such bargaining over the 'effects' of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority, and pensions, among others, which are necessarily of particular importance and relevance to the employees."

The Unions at the time of GM's announcement could have sought a GM agreement to require by the sales contract any purchaser to fill its shop employment needs by first hiring the GM workers. Failing that they could have insisted that GM negotiate to transfer any employee not hired by the purchaser to one of the numerous other GM facilities. *Cf. Cooper Thermometer Co. v. NLRB,* 376 F. 2d 684 (2nd Cir. 1967) (Pet. 15). Or they could have demanded that GM continue each employee's wages and monetary benefits until he found other employment or that GM make additional severance cash payments to accomplish the same objective. Or the Unions may have obtained GM's agreement to some other solution to the anticipated loss of employment.

Regardless of the terms of any such supplemental agreement with GM, the significant fact is that the design of Section 8(a)(5) is that whatever protection can be provided the employees faced with such a situation will result from negotiations between the current employer of such employees and their exclusive bargaining agent. Thus, the duty of the prospective seller to bargain about the effects of discontinuing the facility is envisioned as the meaningful vehicle to maintain the employment of the workers or to provide a

financial cushion against possible unemployment. So in such a situation the workers are not without recourse. And it is not necessary to impose any pre-hire bargaining duty on the purchaser. Congress has already taken care of the eventuality by the duty to bargain imposed on the seller.

GM informed the Unions early in January 1965 of its contemplated action and thereafter had a number of communications and meetings with the Unions relative to the effects of that decision [¶ 8]. GM did not refuse to consider any proposals the Unions cared to make concerning the anticipated termination of their members [¶ 9]. The Unions did not seek or obtain a GM agreement to transfer all the workers not hired by the purchaser or to incorporate in the sales agreement a condition that the purchaser hire the GM shop employees. Perhaps they did not press this matter for fear GM might decide to merely close its Wilshire branch and not seek a dealer to operate from that location. Certainly GM had enough dealers in the area that the retail sales of Cadillacs would not have been seriously lessened by such course of action.

But the fact that the Unions did not obtain an agreement from GM guaranteeing the continued employment of their members is not indicative that Section 8(a)-(5) must provide some additional means of protecting the members' jobs. On the contrary, the policy of the Act is to merely require the employer and the exclusive bargaining agent to bargain and to leave entirely to them whatever solutions, if any, they can mutually find. The Act is grounded on the expectation or hope the parties will arrive at a satisfactory, peaceful resolution. But if they fail to do so, the Labor Board may not

protect either party by imposing its own solution. *NLRB v. Insurance Agents Int'l Union,* 361 U.S. 477 (1960). The parties must then follow some other course outside of the NLRA including possible economic action.

It is not disputed that if GM had merely decided to close Wilshire, the Unions' members could only have such job protection as the Unions were able to get by a contract with GM, pursuant to GM's duty to negotiate relative to the effects of such closing. No reason exists why when a purchaser enters the picture (which enhanced the employment security of the GM workers because of the possibility of being hired by the purchaser) an additional and new duty to bargain (by the prospective purchaser) is necessary to further protect the GM workers.

In the instant situation the Unions apparently became dissatisfied with the protection for their members they had negotiated with GM. They actually filed unfair labor practice charges and a suit against GM [Jt. App. 104] which were dismissed by the Board and the court. They picketed Ehlers to no avail. They lost their court suit against Ehlers. The Board held Ehlers was not a successor to GM. So now they claim that Ehlers, as a naked corporation without any employees, had a duty to bargain with them, while they were the exclusive bargaining agent of GM's employees, about the hiring of the GM employees, even though they never made any demand that it do so.

There is absolutely no merit to the Unions' position. GM did have the duty to bargain, which it fulfilled. Ehlers would have the duty to bargain only when the Unions were the exclusive bargaining agent of Ehlers'

employees in an appropriate unit. The Board properly held they were not. That is the end of the case, just as all parties contemplated from the beginning if there was a finding of no successorship.

If an additional bargaining duty is to be added to the NLRA by requiring a prospective purchaser to bargain with the seller's union with reference to the seller's employees, this must be done by legislation because it involves a basic departure from the fundamental concept applied under Section 8(a)(5) for 34 years that the only duty to bargain is with reference to the employer's own employees. We submit "there is no justification for the drastic sort of judicial legislation that is urged" upon the Court by the Unions herein. *International Union, United Auto etc. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

V.

EVEN UNDER THE UNIONS' ERRONEOUS VIEW OF THE LAW, ITS CONTENTION IS INAPPLICABLE TO THIS CASE BECAUSE THERE WAS NOT A MAINTENANCE OF BUSINESS PURPOSE.

The Unions do not explicate just what kind of a purchaser, who is not a successor, has the duty to bargain with the union of the seller's employees. Judging from their heading (Pet. 15), the purchaser has such a duty if it "maintains a continuity of business purpose". Even if that proposition was sound law, it would have no application here.

While Ehlers sold new and used Cadillacs and had a repair shop, as did GM, its business purpose was basical-

ly dissimilar. GM was a manufacturer who sold its product at retail through its own store at Wilshire. Ehlers, on the other hand, purchased Cadillacs from GM and resold the same and also leased Cadillacs. Ehlers was in competition with all the other local GM franchised dealers and dependent solely upon its retail sales and service business for profit, neither circumstance being true as to GM [¶¶ 3, 23; and see R.E. Exh. 12, ¶ 3].

Thus, as observed by two members of the Board in their separate opinion (Pet. App. 22):

> "Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. I do not think this factor can be ignored. GM's Los Angeles sales outlets, unlike those of Respondents, were intimately tied in with its entire nationwide manufacturing and sales operations. . . ."

Similarly, as observed by Chief Justice Burger (then circuit judge) in the opinion below (Pet. App. 5-6):

> ". . . Even a cursory comparision of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, General Motors and unrelated, whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers.

> Thomas and Ehlers compete with each other for sales to customers while the General Motors managed enterprise was relatively indifferent in the sense that General Motors did not have the same interest in competing with franchise Cadillac dealers as do Thomas and Ehlers. As noted, management, accounting, and advertising were centrally controlled under the factory management but are totally separate and independent after the new franchise dealers took over. . . . attitudes on sales and performance which might have been tolerable to General Motors would not be acceptable to independent dealers."

In his separate concurring opinion Judge Leventhal observed (Pet. App. 7-8):

> ". . . As the majority opinion forcefully points out, there is significant difference in business objective between the independent Thomas and Ehlers dealerships, on the one hand, and the General Motors factory-affiliated service establishment on the other hand, and this a telling factor."

Judge Leventhal cited at this point *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959).

In the *Alamo* case the situation was identical to the instant case in one significant respect, and that is, the discontinuance by a large manufacturer of one of its own retail outlets and the purchase of assets used at that outlet by a new corporation which then became an independent dealer in the sale and service of the same trucks. In finding that the purchaser had no duty to

bargain with the union that represented the seller's employees, the court observed (p. 242):

> ". . . The employee-employer relationship in the operation of Alamo was materially different from the employee-employer relationship in White Motor Company, not just because of a difference in the number of employees or in the turnover, but because the interaction of the employee group with the management of Alamo was completely changed. We mean by this, the difference between the close personal relationship of management and workers characteristic of a small, local business, existing in this case as the record shows, and the disembodied relationship of workers to top management not uncharacteristic of a large corporation when branch workers must accept policies fixed by some far-off head office. . . ."

Thus, the *Alamo* decision, "turns on factual matters reflecting a basic change in the nature and function of the employing enterprise" [*Lloyd A. Fry Roofing Co.*, 176 NLRB No. 136 n. 7, 71 LRRM 1492 (1969)], and in this respect it is indistinguishable from the instant case.

Thus, even assuming there is some merit to the Unions' contention, the proposition of law they seek to establish would not apply to the instant case because of the essential difference in business purpose between GM and Ehlers.

CONCLUSION.

The Unions have not demonstrated that this case presents an issue of important federal law or that there is a conflict between the present decision and prior ones. On the contrary, 34 years of precedent under the NLRA establishes that Ehlers had no duty of any kind to bargain with the Unions. Moreover, the claim of a limited bargaining duty now urged by the Unions was not within the scope of the pleadings and was not litigated before the Board or the Court of Appeals. Accordingly, the Petition has no merit and should be denied.

Dated: August 18, 1969.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969
No. 386

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOU EHLERS CADILLAC; and THOMAS CADILLAC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF THOMAS CADILLAC, INC. IN OPPOSITION.

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IN THE

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October Term, 1969
No. 386

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOU EHLERS CADILLAC; and THOMAS CADILLAC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF THOMAS CADILLAC, INC. IN OPPOSITION.

QUESTIONS PRESENTED.

We believe the only question presented is whether the court below correctly held that substantial evidence supports the finding of the Board that upon the cessation of the retail sale of Cadillac automobiles by General Motors Corporation in Los Angeles, California, and the acquisition from General Motors by two independent dealers of competing local Cadillac dealerships, one at

each of the locations in Los Angeles where General Motors formerly sold Cadillacs, the two dealers did not become "successor employers" to General Motors as that term is used in Federal labor jurisprudence, and were therefore not required to assume its obligations with the two unions with whom it had a collective bargaining agreement.

Petitioners have stated the question presented to be a very different one, quite independent of the doctrine of successorship:

> "Whether Section 8(a)(5) imposes the duty upon the purchaser of a business to negotiate with the certified bargaining agent as to the retention of all or some of the seller's employees on the payroll?" (Pet. 2).[1]

We do not believe the latter question is properly before the Court because it was neither made an issue in the Complaint, nor litigated before either the Board or the court below.

STATEMENT.

As of the early part of 1965, General Motors Corporation maintained a branch of its Cadillac Motor Car Division in Los Angeles, consisting of two retail sales outlets (established in 1949 and 1954, respectively) for the sale of Cadillac motor vehicles, parts and accessories, and the servicing of such vehicles, one at the intersection of 7th and Bixel Streets ("Bixel") and one at 5151 Wilshire Boulevard ("Wilshire") [A. 214, 207, 215]. A used car lot at 501 So. Vermont Avenue

---

[1] "Pet" herein refers to "Petition for Writ of Certiorari"; "A" to the printed "Appendix of the Parties"; "R" to "Official Report of Proceedings before the National Labor Relations Board."

("Vermont") was also maintained as a part of said branch [R. 255; A. 22].

Commencing in 1957, General Motors entered into a succession of collective bargaining agreements with unions—petitioners Machinists[2] and Painters—representing the employees of such Los Angeles branch [A. 1025-72, 948-9, 952-3]. Since 1958, each agreement had been with both unions. As of 1965, the current agreement had been executed December 1, 1964 [A. 577-636]. It provided that it would remain in effect until December 1, 1967, and thereafter until notification was given by either party. The agreement contained no provision making it binding on successors and assigns of General Motors or purchasers of its assets [R. 242].

Commencing in March, 1965, General Motors had conversations wih two individuals, La Rue Thomas and Lou Ehlers, which culminated in May and June, 1965, in the discontinuance by General Motors of its sales and service operations at Bixel, Wilshire, and Vermont, and the acquisition of independent and competing Cadillac dealerships at Bixel and Wilshire, respectively, by respondents Thomas Cadillac, Inc. and Lou Ehlers Cadillac (which are corporations formed by said La Rue Thomas and Lou Ehlers) [A. 238, 841-2, 843, 425]. The used car lot at Vermont was discontinued.

---

[2]Abbreviations used herein: Petitioner International Association of Machinists, District Lodge 94-AFL-CIO ("Machinists"); Petitioner Automotive Marine, Production Finishers, Equipment, Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO ("Painters"); Respondent National Labor Relations Board ("the Board"); Respondent Lou Ehlers Cadillac ("Ehlers"); Respondent Thomas Cadillac, Inc. ("Thomas").

Labor Relations Aspects of the Transfer to Thomas.

Commencing in January, 1965, General Motors notified the unions that it was reconsidering its policy of operating its own Cadillac agencies and was contemplating the transfer of its Bixel and Wilshire branches to independent dealers [A. 959-60]. In anticipation of such transfer, on April 28, 1965, a supplement to said collective bargaining agreement was executed by General Motors and the unions permitting hourly employees to "waive their seniority rights and take a lay-off out of line of seniority under the seniority provisions of the existing agreement" if their services were no longer needed at the Cadillac Motor Car Division, Los Angeles Branch [A. 973-4, 640-1].

General Motors kept the unions advised of its negotiations and of the arrangements which it arrived at with Thomas and Ehlers [A. 1077-80, 1081].

Although not requested by Thomas to do so, on May 28, 1965, General Motors terminated all of its employees at both branches [A. 143, 995].

Thomas thereafter hired its own employees solely on the basis of ability and without reference to whether or not they belonged to unions, or whether or not they had been General Motors' employees [A. 267, 279, 801, 278].

As stated by the Board in its opinion:

> ". . . Moreover, it is clear that both Thomas and Ehlers selected their employees herein involved on the basis of skill and ability, and were in no way influenced by union membership of the job applicant . . ." (Pet. Appx. B, p. 19).

Prior to May 28, 1965, General Motors employed 75 persons at Bixel, covered by the collective bargaining

agreement; Thomas hired 63 employees in such categories, 16 of whom had been General Motors employees [A. 717-9, 878, 259]. Out of 21 supervisory employees hired by Thomas, 7 had worked for General Motors—5 in the same capacity as they had worked for that firm, and 2 in different capacities [A. 1114, 243-5].

The unions wrote Thomas requesting that it meet with their representatives, and also that it arbitrate whether or not it was bound under the terms of the agreement between General Motors and the unions [A. 719, 722, 723, 725]. It did not respond to these requests, having been advised by its labor consultant that it was not obligated to do so [R. 87; A. 262].

Contrast of Operations at Bixel Under General Motors and Under Thomas.

Before the transfer, the Los Angeles branch of the Cadillac Motor Car Division of General Motors was essentially a portion of an *international* business, numerous aspects of which, including the negotiation of its collective bargaining agreements, were handled by personnel of its headquarters in Detroit, Michigan; these included: given orders to the general manager of the Los Angeles branch, approving major expenditures and capital improvements, placing insurance, employing attorneys, handling new car advertisements, payment of the top management employees of Bixel [A. 936; R. 148; A. 209, 217 218, 219]. General Motors' collective bargaining agreement had many national aspects—it included GM's national pension plan, insurance program, and income security plan, and under it various benefits were based on employment in any General Motors plant anywhere (Pet. Ex. B, pp. 22-23).

After the transfer, the two businesses were entirely local in character, not only as to ownership and management, but with reference to all aspects of the day-to-day operations engaged in; Thomas did not purchase any goodwill, customer lists, trade secrets, or tangible assets; in all tax, license, and insurance matters, with both state and federal governments, Thomas was treated as a wholly new business [A. 224, 234, 840, 885, 147-50, 262-3, 174-5; R. 250].

Before the transfer, the Los Angeles branch of the Cadillac Motor Car Division of General Motors Corporation was for most purposes a single unit, consisting of Bixel, Wilshire, and Vermont [A. 940]. Indeed, Wilshire was classified by General Motors as a sub-branch of Bixel [A. 299]. Both stores operated under a common name, were in the charge of a single general manager, (who was also in charge of two San Francisco stores), and nearly all of the paperwork, including financial statements, accounts receivable and payable, purchasing, credit, payroll, vacations, personnel files, and stock savings plans, for both stores were administered at Bixel [A. 207-11, 226-7, 330]. Parts, accessories, and used cars were exchanged and interchanged between the various locations, and salesmen from one location would frequently take customers to see cars at other locations [A. 214, 299, 297, 225-6, 298-9, 220-1].

After the transfer, Thomas, at the former Bixel location, and Ehlers, at the former Wilshire location, were not only independent of each other (as well as of General Motors) but were in direct competition with each other, as well as with all other Cadillac dealers in the geographic area [R. 201, 200, 437].

Proceedings Below.

Painters and Machinists each filed charges against Thomas on June 3 and 4, 1965, respectively [A. 324-5, 331-2]. Each filed amended charges on November 17, 1965 [A. 329-31, 333-5].

A consolidated complaint against Thomas and Ehlers was issued by the General Counsel on November 30, 1965 [A. 339-57; 10]. Therein Thomas was charged with unfair labor practices in refusing to bargain collectively with Painters and Machinists [A. 355] and interfering, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) and (5) of the Act [A. 356].

The cause was heard before the Trial Examiner on February 23, 24, 25, and 28, 1966 [A. 10].

The Trial Examiner's Decision, rendered May 17, 1966, found, among other things, that Thomas and Ehlers were "successor employers" to General Motors (Pet. Appx. C, 39-43), and in his Recommended Order proposed that Thomas and Ehlers should be required, among other things, to honor and give effect to the December 1, 1964, collective bargaining agreement between General Motors and the unions (Pet. Appx. C, 62-3).

Various objections thereto were filed by Thomas [A. 63-87].

The Board found that Thomas and Ehlers were not "successors" to General Motors, and on that sole ground, without considering any other objections raised by Thomas or Ehlers, dismissed the complaint (Pet. Appx. B, 15-20).

The unions filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Thomas' motion to intervene was granted by that court. (Cf. *International Union, Local 283 v. Scofield,* (1965) 382 U.S. 205).

The Court of Appeals denied the petition, holding that the Board's determination that Thomas and Ehlers were not successors to General Motors was supported by substantial evidence (Pet. Appx. A, 1-7).

SUMMARY OF ARGUMENT.

The only question properly presented in the present case—the propriety of the Board's finding that Thomas did not violate the NLRA because it is not a "successor" to General Motors—is, as the court below found, amply supported by substantial evidence, which establishes that the nature of Thomas' business is substantially different in numerous respects from that of its predecessor, General Motors.

The new question which petitioners seek to raise for the first time—whether the purchaser of a business has a duty to negotiate with the certified bargaining agent as to the retention of some or all of the seller's employees—was not presented by the pleadings, and was not litigated before either the Board or the court below. Petitioners' contention that the decision of the court below conflicts with federal court decisions upon which petitioners rely is equally devoid of merit—none of those decisions involve the question in any way.

ARGUMENT.

I.

The Question Presented by Petitioners States No Ground for Review by This Court.

Petitioners state that the "Question Presented" is

> "Whether Section 8(a)(5) imposes the duty upon the purchaser of a business to negotiate with the certified bargaining agent as to the retention of all or some of the seller's employees on the payroll." (Pet. 2).

This presents no proper question for review by this Court for each of the following reasons:

A. The Question Has Not Been Presented or Litigated Below.

Petitioners contend that the above question was presented by the Complaint on which the case was tried (Pet. 20) and that the question was actually litigated (Pet. 21).

The facts are to the contrary.

In the Consolidated Complaint, issued November 30, 1965, on which the case was tried below, it was alleged:

> "Cadillac Motor Car Division, General Motors Corporation, Los Angeles Branch, herein called Cadillac, prior to June 1, 1965, opearated two retail Cadillac sales and service agencies, to wit, one located at 5151 Wilshire Boulevard, and one located at 1076 West Seventh Street, both in Los Angeles, California [A. 342-3].
>
> "Respondent Thomas is, and has been since on or about June 1, 1965, the successor to Cadillac at Cadillac's location at 1076 West Seventh Street, Los Angeles, for the purposes of the Act." [A. 345].

Therein Thomas was charged with unfair labor practices in refusing to bargain collectively with Painters and Machinists, and interfering, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act [A. 355, 356].

Nowheres in the Complaint is the question to which petitioners refer stated.

As stated in the concurring opinion in the Court of Appeals:

> "In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motors' employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.
>
> "This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force." (Pet Appx. A, p. 13).

In support of their contention that the question is presented by the Complaint, petitioners refer to certain paragraphs therein (Pet. 20-1). We quote these paragraphs in full:

> "23. Since on or about May 17, 1965, and thereafter, the IAM has requested, and continues to request, that Respondent Thomas bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining

representative of the employees of Respondent Thomas in the unit described in paragraph 19 above [A. 350].

"39. Since on or about May 17, 1965, and at all times thereafter, Respondent Thomas has refused, and continues to refuse, to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with the Painters Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described in paragraph 31 above." [A. 354].

Petitioners emphasize the words *and conditions of employment* in the foregoing paragraphs (Pet. 20).

We are unable to understand how these words can be stretched to mean "retention of all or some of the seller's employees on the payroll."

Certainly that is not the ordinary meaning of the words "conditions of employment."

We believe the meaning of these words is too clear to require construction, but application of the conventional rules of *ejusdem generis* and *noscitur a sociis* further establishes that the meaning sought by petitioners cannot be ascribed to these words.

In *United States v. Salen,* (1914) 235 U.S. 237, 249, this Court said:

"Such an interpretation . . . would ignore the fact that the meaning of the words is affected by their context, and violates the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be interpreted in their nar-

> rower sense, and understood to refer to things of the same nature as those described in the associated list, enumeration, or class."

And, in *Wharton v. Wise,* (1894) 153 U.S. 155, 169, quoting from *Virginia v. Tennessee,* (1893) 148 U.S. 503, 519, it was said:

> "'*Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.'"

Petitioners further contend that the question was actually litigated before the Board, and that under the case law "so long as a matter is litigated at the hearing and a party is not surprised, the fact that a Board order is at variance with a complaint is not a ground for declaring it invalid," citing *NLRB v. Fant Milling Co.,* (1959) 360 U.S. 301; *National Licorice Co. v. NLRB,* (1940) 309 U.S. 350, and *NLRB v. Kiekhaefer,* 7 Cir. (1961) 292 F. 2d 130[3] (Pet. 21).

In support of their contention that "this issue was fully litigated before the Trial Examiner" (Pet. 21) petitioners refer only to four letters written to Thomas by counsel for petitioners between May 17, 1965 and June 9, 1965, which were introduced in evidence as

[3]The actual holdings in these three cases was that the Board, in formulating or amending a complaint, may take cognizance of matters occurring subsequent to the filing of the charge, which grew out of and were continuations of the conduct alleged in the charge.

exhibits before the Trial Examiner (Pet. 21; A. 719, 722, 723, 725), and to five letters between attorneys for petitioners and Ehlers and its attorneys (Pet. 21).

These letters do not substantiate petitioners' contention in any way.

The letters to Thomas (1) request a meeting with Thomas [A. 720, 722]; (2) request Thomas to arbitrate whether it is bound by General Motors' contract with petitioners [A. 723, 725]; and (3) assert Painters' contention that Thomas is in violation of that contract [A. 725].

The question which petitioners now seek to raise was not mentioned therein.

Nor was the question raised elsewhere in the course of the proceedings before the Trial Examiner.

However, in his closing argument at said proceedings, counsel for petitioners used the word "successor" or "successorship" 23 times [R. 544-65]. He said, in part:

> "I think the question is, is there a successorship? Does the contract apply? We hold the contract applies per se." [R. 548].

In the Trial Examiner's Decision (Pet. Appx. C, pp. 24-64), the first of his four Concluding Findings related to the question of whether or not Thomas and Ehlers were "successors" to General Motors.

His finding in this regard commences:

> "First: The General Counsel contends that each Respondent is 'the successor, pro tanto,' of General Motors and obligated to recognize and bargain with the Unions. The crucial question in this re-

gard is 'whether the employing industry remains essentially the same after the transfer of ownership.' N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303 (C.A. 5)." (Pet. Appx. C, p. 39).

After an extended discussion of the question, occupying four printed pages (Pet. Appx. C, pp. 39-43), in the course of which he cited more than a dozen cases relating to the subject, the Examiner found that Thomas and Ehlers were "successors" to General Motors.

His other findings were:

2. By withdrawing recognition during the term of the contract, repudiating it, and unilaterally changing working conditions, Thomas and Ehlers violated Sections 8(a)(5) and 8(d) of the Act (Pet. Appx. C, pp. 43-50).

3. The multi-establishment units of Thomas and Ehlers continued as appropriate units for collective bargaining after the transfer to them and they were bound to bargain collectively and jointly with the unions in such unit (Pet. Appx. C, pp. 50-53).

4. Thomas' and Ehlers' defense of good faith doubt as to the unions' majority status was not well taken (Pet. Appx. C. pp. 53-58).

None of his findings in any way relate to the question petitioners now seek to raise.

In its brief in support of exceptions to the Trial Examiner's decision, Thomas argued, as one of its grounds, that it was not a "successor" to General Motors [A. 71, 82-5].[4]

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[4]It also argued four other grounds:

(a) That Thomas at all times had a good faith doubt that the unions represented a majority of the employees at Thomas Cadillac [A. 71, 75-6].

On May 17, 1966, the Board rendered its decision and its order dismissing the complaint in its entirety.

In its majority opinion, the Board referred to the Trial Examiner's finding that Thomas and Ehlers were successors to General Motors and were required to recognize and bargain with Painters and Machinists (Pet. Appx. B, p. 15), and to Thomas' and Ehlers' contentions that they were not such successors (Pet. Appx. B, p. 16); and after reviewing the evidence and pointing out what it regarded as significant, the Board found that Thomas and Ehlers were not successors to General Motors and therefore "had no obligation to bargain with the Unions with respect to terms and conditions of employment of employees formerly employed by G.M., or with respect to those employees whom they hired after taking over the separate dealer franchises" (Pet. Appx. B, p. 19). It therefore held that Thomas and Ehlers had not violated Section 8(a)(1) and (5) of the Act and ordered the complaint dismissed.

The concurring opinion stated:

> "I agree with my colleagues that the complaint in this case should be dismissed. I also agree with their conclusion that neither Thomas nor Ehlers

---

(b) That the industry units which the unions sought to represent were not appropriate units for collective bargaining in the industry involved [A. 71, 76-8].

(c) That the demands made by the unions constituted only a demand that Thomas recognize or bind itself to the contract hitherto entered into between General Motors and the unions (which demand was followed by an action seeking that relief brought in the Superior Court in the State of California for the City of Los Angeles) [A. 70-1].

(d) That as a matter of contract law, Thomas did not become bound by the provisions of the contract between General Motors and the unions [A. 71, 82].

is a successor employer to the original General Motors retail enterprise at the Bixel and Wilshire locations in Los Angeles, California." (Pet. Appx. B, p. 21).

No question other than the successorship question was discussed in either the majority or the concurring opinion.

In "Petitioners' Brief" filed in the United States Court of Appeals for the District of Columbia Circuit, in which petitioners sought review of the foregoing order of the Board, petitioners stated that the issue was:

> "Whether the board properly reversed the Trial Examiner and dismissed the complaint which alleged that the intervenor Thomas Cadillac, Inc., *was a successor* to Cadillac Motor Car Division, Los Angeles Branch, General Motors Corporation, violated Section 8(a) (5) and (1) of the Act by refusing to bargain with petitioners." (P. 1; emphasis added).

Quite properly, the Court of Appeals ruled only on the question of successorship on which the Board had rested its decision (Pet. Appx. A, p. 1 *et seq.*).

In view of the foregoing, we cannot agree with petitioners' contention that the question was either presented by the Complaint or was actually litigated.

B. There Is No Conflict of Decision on the Point.

Petitioners contend that the decision of the Court of Appeals on the question they now seek to raise was "in conflict with applicable decisions of this Court and of the Second, Third, and Ninth Circuits" (Pet. 23).

But the Court of Appeals in this case did not decide the question petitioners now seek to raise.

Nor did any of the decisions of this Court and of the Courts of the Second, Third, and Ninth Circuit on which petitioners rely even remotely relate to the question which petitioners now seek to assert:

In *Fibreboard Paper Products Corp. v. NLRB*, (1964) 379 U.S. 203 (Pet. 15) it was held that an employer had violated the NLRA by refusing to bargain with a union representing certain of its employees about whether it would let an independent contractor perform certain operations which up to that time had been performed by those employees.

In *NLRB v. Erie Resistor Corp.*, (1963) 373 U.S. 221 (Pet. 15) it was held that an employer committed an unfair labor practice by awarding 20 years additional seniority credit for future layoffs to strike replacements and strikers who returned to work before the strike ended.

In *NLRB v. Fleetwood Trailer Co.*, (1967) 389 U.S. 375 (Pet. 16) it was held that an employer was guilty of an unfair labor practice where, four months after a strike, it hired 6 new employees for jobs which 6 strikers were qualified to fill who had applied for reinstatement after the strike but had been rejected because no jobs were then available, and who had not obtained other regular and substantially equivalent employment.

In *Railroad Telegraphers v. Chicago & N. W. Railway Co.*, (1960) 362 U.S. 330 (Pet. 23) it was held that where a railroad planned to abolish certain inefficient stations, and the Union threatened to strike to en-

force its demand that the existing agreement between the Railroad and the Union should be amended by adding a provision that no existing position should be abolished without the consent of the Union, a "labor dispute" existed, hence the injunction of the strike was prohibited under the Norris-La Guardia Act.

In *Cooper Thermometer Co. v. NLRB,* 2 Cir., (1967) 376 F. 2d 684 (Pet. 15) where an employer established a new plant, 27 miles away from the old, it was held that it must make an offer of preferential reinstatement to the employees of the old plant.

In *NLRB v. Royal Plating and Polishing Co.,* 3 Cir., (1965) 350 F. 2d 191 (Pet 16), it was held that the record was inadequate to determine whether the withholding by the employer from the union of information relative to its intention to close part of its business for economic reasons, and thereby preventing bargaining on issues presented by the shut-down, constituted a refusal to bargain and an unfair labor practice.

In *K.B. & J. Young Supermarkets v. NLRB,* 9 Cir., (1967) 377 F. 2d 463, *cert. den.,* 389 U.S. 841 (Pet. 18-19), the purchaser of three markets from a large grocery chain caused the mass discharge of the employees for anti-union reasons just prior to the sale. Reinstatement of back-pay for discharged personnel and recognition of the union for bargaining purposes was ordered.

The foregoing cases may illustrate the generality that employees have an important interest in their jobs (a proposition hardly requiring the elaborate citation of cases which it has been given by petitioners).

They have nothing whatever to do with the specific question which petitioners seek to raise here.

This is likewise true of the case of *Westinghouse Electric Corp.*, (1965) 150 NLRB 1574 (Pet. 16) holding that where the employer had previously let thousands of subcontracts, and there was no provision relating thereto in the collective bargaining agreement, the employer had no duty to notify and consult with the union before letting an additional subcontract which did not eliminate any jobs.

Petitioners here, as in the court below, continue to rely upon the decision of the Board in *Chemrock Corp.*, (1965) 151 NLRB 1074 (Pet. 19).

The inapplicability of the holding here has been pointed out by both Ehlers (Brief in Opp. 28-29) and the Board (Brief in Opp. 7-8).

We would add that if in fact the holding in *Chemrock* had been contrary to the decision of the Board in the present case, it would have *ipso facto* been overruled. See *Gordon: Legal Questions of Successorship*, (1969) 3 Ga. Law Rev. 280, 289-91.

The fact that the Board did not mention the earlier case in its decision below is immaterial.

In *Asher v. Texas,* (1888) 128 U.S. 129, 132, this Court said:

> "Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."

In *Tallakson Ford, Inc.,* (1968) 171 NLRB No. 67, 68 LRRM 1136, a decision of the Board subsequent to its decision in the present case, a Ford dealer with a collective bargaining agreement sold his business to a purchaser who acquired a franchise from Ford Motor Co. effective the day after the termination of the seller's franchise. The bargaining unit consisted of 9 salesmen.

The purchaser acquired nearly all of the seller's 50 nonsales personnel, but only 3 of its 9 salesmen. The new salesmen were employed without regard to union considerations.

It was held that the purchaser was not a successor, and was not obligated to bargain with the union.

As a supporting authority, the Board cited its decision in the present case.

C. No Important Question of Federal Law Is Presented.

Petitioners make the bare statement that "an important question of Federal law is presented" in the Conclusion of their Petition (Pet. 23), but give no reasons why they contend that this is so to which reply can be made.

The relationship of the question to the NLRA has been discussed at length by Ehlers (Brief in Opp. 31 *et seq.*). We shall not discuss it here.

II.

The Affirmance by the Court of Appeals of the Board's Holding That Thomas Was Not a "Successor" to General Motors Presents No Ground for Review by This Court.

At common law, the purchaser of a business, at least unless otherwise provided in either the collective bargaining agreement or the contract of purchase and sale, is not bound by the collective bargaining contract of the seller.

> *International Longshoremens Union v. Juneau Spruce Corp.*, 9 Cir. (1951) 189 F. 2d 177 (aff'd on other grounds 342 U.S. 237).

Where the question has arisen under the National Labor Relations Act:

> "The courts and the National Labor Relations Board have developed and applied a successorship doctrine based on the employment relationship—a concept which, of course, is unique to labor law." (*Walker Bros.*, 41 Lab. Arb. 844, 848-9 (1963).

As stated by counsel for petitioners in his argument before the Trial Examiner:

> "In general I think we are aware by now the body of law, that is Board law and Court law, that is built up upon the question" [R. 545].

The essence of the doctrine of successorship is that where a purchaser is held to be a "successor" to the seller, he is held to be bound by the obligations of the seller towards the seller's employees.[5]

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[5]A similar doctrine was also applied by the War Labor Board during World War II. *Reagan: The contractual obligations of a successor employer under the collective bargaining agreement of a predecessor,* 113 Univ. of Penn. Law Rev. 914, 920-1 (1965).

There have been scores of judicial decisions, and an even larger number of NLRB decisions, involving under what circumstances a purchaser does or not become a "successor."

In *NLRB v. Auto Ventshade, Inc.*, (5 Cir.) 276 F. 2d 303, 304 (1960) the court said:

> "The crucial question in determining if the certification is binding on the successor is *whether the employing industry remains essentially the same* after the transfer of ownership." (emphasis added).

In *Forkosch: A Treatise on Labor Law*, (2nd ed., 1965) 623 it is stated:

> "In general, it may be said that this successor duty to bargain seems to depend upon *whether the appropriate unit, and the business operation, retain their former respective characters* under the new ownership." (emphasis added).

(The same or a similar doctrine was recognized by this Court in *Wiley v. Livingston*, 376 U.S. 543, 551 (1964) in holding that, in an action under section 301 of the Labor Management Relations Act, where a transferee did become a "successor employer" it was bound under the arbitration clause of the transferor's collective bargaining agreement to arbitrate with the union regarding what rights of the employees set forth in the contract survived the transfer and the expiration of the contract. See *The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons Inc. v. Livingston*, 82 Harv. Law Rev. 418, 428-9 (1968).

The criteria for determination of when the purchaser of a business does or does not become a "successor" to the seller have been summarized in *Sangerman: The labor obligations of the successor to a unionized business* (1968), 19 Labor Law Journal 160, 163:

> "Successorship is primarily a factual question. The following are a number of factors which may be determinative of successor status: (1) whether a going business, or merely assets are transferred; (2) whether there is a continuity of ownership interest between the transferor and transferee; (3) whether the nature of the business remains the same; (4) the number of employees assumed by the acquiring company; (5) whether the business remains at the same location; (6) whether there is evidence of an intent to avoid dealing with the union; (7) the point of time of the transfer in relation to the certification of the union; and (8) the retention of supervisory personnel."

Similar enumerations of factors are set forth in other authorities:

Reagan: The contractual obligations of a successor employer under the collective bargaining agreement of a predecessor, 113 Univ. of Penn. Law Rev. 914, 922 (1965);

Moss: Purchase of a business, 43, Calif. State Bar Journal 387, 389 (1968);

Maddux: Labor law implications in the sale, transfer or discontinuance of all or part of a business operation, 18 Business Law Rev. 819, 835-6 (1963).

Absence of "Successorship" in the Present Case.

Applying the above-mentioned criteria to the present case, it is apparent that the evidence overwhelmingly supports the decisions below holding that there was no successorship.

The nature of the business was basically changed from an operation by General Motors, the world's largest corporation, the major aspects of which were supervised by its head office in Detroit, to a small, independent, locally owned operation, which purchased no good will, customer lists, or trade secrets from General Motors [A. 936].

In this respect the case closely resembles *NLRB v. Alamo White Truck Service, Inc.*, 5 Cir., 273 F. 2d 238 (1959) where White Motor Company, a major truck manufacturer whose head office was in Cleveland, closed its San Antonio, Texas branch, and entered into a local retail dealership agreement with Alamo, a company established by two of its principal employees in the former San Antonio branch.

In holding that there was no successorship, the court said:

> "As the trial examiner pointed out, 'not only the business but the functions changed.' The branch was controlled entirely from Cleveland, Ohio. All policies were determined at the home office of the White Motor Company in Cleveland and centered around the fact that the company was engaged in manufacturing trucks and selling trucks on a nation-wide scale. The policies were transmitted to the branch manager through a White vice-president and the regional director. On the other hand,

with Alamo, control of policy is vested in the officers and directors of a small, independent business . . .

"The difference in the nature of the business and in the functions is of material importance in determining the employee-employer relationship. During the time the branch in San Antonio was in operation all White's labor policies were determined in Cleveland; local White employees received their instructions and were 'placed under' R. C. Crotty, a labor relations director with his head office in Cleveland. Thus, at the time of the hearing in the representation case, Mr. Crotty was in San Antonio and instructed Cregor, the branch manager, exactly what to do. The branch manager had no discretion or independence in the matter; he carried out instructions he received from the labor relations director in Cleveland. The same thing was true with reference to sales policies, purchase policies, and all other important matters. Although no large company fails to consider local conditions, there is a substantial difference, in general and in this case, between the policies and operations of a large, nationwide organization and those of a small local business." (pp. 241-2).

In the present case, there is an additional factor making it an even stronger case than *Alamo*—the new local business is not one, but two—which are in competition with each other.

In this respect the case resembles *International Association of Machinists v. Pivot Punch Corp.*, 34 Misc. 2d 645, 229 N.Y.S. 2d 476 (1962) where, in settlement

of litigation between two owners of a corporation, two new corporations, the King Corporation and the Kopczynski Corporation, were formed, each of which received part of the assets of the old corporation. It was held that the King Corporation was not a successor to the predecessor corporation.

After June 1, 1965, there was no continuity of ownership—General Motors, Thomas, and Ehlers were all independent [A. 234, 224, 885, 161-2].

Thomas acquired no goodwill, trade name, or customer lists from General Motors—it acquired its own list of prospective purchasers from another independent source [A. 147, 150, 260; R. 158-9].

The Court of Appeals has referred to the "substantial non-discriminatory change in personnel found by the Board" (Pet. Appx. A, p. 7), which we have discussed in our Statement.[6] In this respect the facts were similar to those in *NLRB v. John Stepp's Friendly Ford, Inc.*, (9 Cir.) 338 F. 2d 833 (1964) involving the sale of the business of a Ford-Lincoln-Mercury dealer.

There were numerous other changes in Thomas' business operations from those of General Motors—its decision to lease automobiles [A. 256]; its customer installment financing [A. 314, 264]; its contractors [A. 314-5, 265]; its financing of new car purchases [A. 264]; its rates of pay [R. 496; A. 815, 266].

All of the foregoing matters considered together make it clear that the differences between Thomas and

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[6]In this respect the facts are almost exactly the opposite of those in *Texas Eastman Company*, (1969) 175 NLRB No. 105, 71 LRRM 1098 (Pet. 21). There *all* of the employees of the successor had been employees of the predecessor.

General Motors were so substantial that the question of whether the finding below that Thomas was not a "successor" to General Motors was supported by substantial evidence presents no ground for review by this Court.

As stated in the concurring opinion of the Board:

> "Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. (Pet. Appx. B, p. 22)."

Conclusion.

The petition for a writ of certiorari is devoid of merit and should be denied.

Respectively submitted,

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